TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted] 70

PHILADELPHIA COMPANY, APPELLANT,

vs.

JACOB M. DICKINSON, SECRETARY OF WAR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 14, 1909.

(21,724.)

(21,724)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 498.

PHILADELPHIA COMPANY, APPELLANT,

vs.

JACOB M. DICKINSON, SECRETARY OF WAR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 26, 1909.

In the Court of Appeals of the District of Columbia.

No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania,
Appellant,
vs.
LUKE E. WRIGHT, Secretary of War.

a Supreme Court of the District of Columbia.

In Equity. No. 27348.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania,
Complainant,
vs.
LUKE E. WRIGHT, Secretary of War, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Filed February 17, 1908.

In the Supreme Court of the District of Columbia.

In Equity. 27348.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania,
Complainant,
vs.
WILLIAM H. TAFT, Secretary of War, Defendant.

Amended Bill of Complaint.

To the Honorable the Judges of said Court:

Comes now the Philadelphia Company, the Complainant in the above entitled cause, and files this amendment to its original Bill of Complaint herein the same to be taken and read as a substitute

for the whole of said original Bill of Complaint subsequent to the title of the cause as therein set forth, and the said amendment or amended Bill of Complaint being as follows, to-wit:

The Philadelphia Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and having its principal place of business in the City of Pittsburgh, County of Allegheny, in said State, brings this its Bill of Complaint against the Honorable William H. Taft, Secretary of War for the United States:

And thereupon your Orator complains and says:

I.

That your Orator is a corporation duly created and existing under the laws of the Commonwealth of Pennsylvania.

That the defendant, the Honorable William H. Taft, is
2 the Secretary of War for the United States, and is a resident of the District of Columbia, within the jurisdiction of this Honorable Court.

II.

Your Orator is the owner in fee of a certain tract of land known as "Brunot's Island," formerly Chartiers or Hamilton's Island, the same consisting of an island situated and being in the Ohio River within the County of Allegheny, in the State of Pennsylvania, and in the Ninth Ward of the City of Allegheny, in said County. The said island under its then name of Chartiers or Hamilton's Island was originally granted by the Commonwealth of Pennsylvania to Robert Elliott and Eli Williams by letters patent of the Commonwealth dated March 13, 1790, and of record in the Patent Office at Harrisburg, Pennsylvania, in Patent Book No. 17, page 137, copy of which letters patent are herewith filed marked "Complainant's Exhibit A." Said letters patent contain no description of said island by courses and distances, nor is there any plan of the same of record. The title to said island subsequently passed from Elliott and Williams by various conveyances and finally became and is vested in your Orator; and the said island, including the land submerged or covered by water out to the Commissioners' Line and Harbor Lines hereinafter mentioned, was at the time of the grievances, hereinafter complained of, and now is in the possession and occupancy of your Orator.

III.

On the 16th of April in the year 1858, there was enacted by the Commonwealth of Pennsylvania, a statute entitled, "An Act establishing high and low water lines in the Allegheny, Monongahela and Ohio Rivers, in the vicinity of Pittsburgh." Pamphlet Laws, 326.)

3 Under and by this statute said Commonwealth of Pennsylvania authorized the District Court of said Allegheny County, in said State, to appoint three disinterested persons as Commissioners for the purpose of having surveys made, and ascertaining,

fixing and marking the lines of ordinary low water and the lines of ordinary high water along the rivers Allegheny, Monongahela and Ohio, including said Brunot's Island.

It was stated in said Act that the lines of the land on and along the shores of these rivers, at and near the City of Pittsburgh, had not heretofore ever been clearly ascertained and that it was important to the owners of such lands and to the persons navigating the waters of said rivers, and to all parties interested, to know and have their several rights and privileges in extension and limitation ascertained and defined. In order to attain this object, it was, accordingly, provided in said Act that said Commissioners were to hear all parties interested and take other measures to ascertain accurate information as to the exact location of the ordinary high water and low water lines, and by Section IV of said Act it was further provided as follows:

"That the said Commissioners when they shall have completed their surveys, and shall have determined the limits and located the said lines of low and high water mark shall cause to be made a correct map or plan of the same with such description and explanation as may be necessary to a perfect understanding thereof and shall return the same authenticated by their respective signatures and that of the surveyor to the District Court, aforesaid; and it shall be the duty of the prothonotary of said Court to receive and file said map or plan in his office for public inspection and examination, and to give notice in at least three daily newspapers published in the City of Pittsburgh that on a day certain to be appointed by the Court the said Court will hear any objections which may be made thereto by any person or parties who may consider themselves aggrieved by the adoption of the same; and the said Court after hearing the objections shall judge and determine whether the same shall be fully established or be returned to the Commissioners either in whole or in part for their re-examination; and if so returned the said
4 Commissioners shall proceed to reconsider the same and thereafter shall return to the said Court in the manner aforesaid said maps with such alterations and amendments, if any, as they shall deem necessary and proper. The said Court after such determination shall direct said map or plan, either with or without such alterations as shall have been made to be recorded and thenceforth the said map or plan so recorded, shall be taken or allowed for the purposes herein mentioned and contained, and the lines so approved shall forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid."

And your Orator further shows that Commissioners were duly appointed by said District Court of the County of Allegheny, in the State of Pennsylvania, as provided in said statute; that after qualifying, as required by said Act, said Commissioners did proceed in the manner prescribed by said Act to ascertain, determine, fix and mark the lines of actual ordinary high water and the lines of actual ordinary low water as said lines then existed along the shores of the said Ohio River and of the said Brunot's Island; and, as required by said Act, after having completed surveys, did cause a cor-

rect map or plan of the same, showing the said lines of low and high water mark, to be made, and returned the same, duly authenticated by their respective signatures and that of the Surveyor, to the said District Court, which Court, after having given due notice and afforded proper opportunity to all parties interested to present objections, if any they should have, to the location of said high and said low water lines, did adjudge and determine that the same as fixed and ascertained in said map or plan, should be and were fully and finally established; and said lines were fixed and located by said Commissioners exactly in accordance with the then existing actual ordinary high and low water marks on said shore, and your Orator respectfully submits that the lines so approved, became, and were, the final and stable boundary lines between the property of the owners of said Brunot's Island and the land under water belonging to the City or Corporation of Pittsburgh, as provided
5 in said Act of Assembly, and that all the land, whether under water or above water, inside and landward of said lines thus fixed by said Commissioners, became the property of the then owners of said Brunot's Island, and that by virtue of the said Act of Assembly of the State of Pennsylvania and the said proceedings taken by said Commissioners, and especially the establishing by them of said high water line, the right of the owners of said Brunot's Island to any accretions to said island, beyond said Commissioners' Line was taken away, and at the same time the said Commissioners' Line being the permanent boundary aforesaid of said island, the said owners were no longer subject to any loss or diminution of said land by reason of the same being submerged or covered by water whether through the avulsion of floods or freshets or through gradual erosion; that is to say, the imperceptible washing away of the shore.

And your Orator further avers that by means of the successive conveyances hereinbefore referred to, said island including any submerged part, passed to, and is the property of your Orator. And your Orator files herewith a copy of the said map or plan of the said Commissioners, showing the location of said high water line as fixed by them, with the dotted lines upon it showing the Harbor Lines fixed by the Secretary of War, as hereinafter set forth, marked "Complainant's Exhibit B," and prays that the same may be taken as a part of this Bill of Complaint.

IV.

Further complaining your Orator shows unto your Honors that subsequent to the establishment in 1865 by said Commissioners of the line of high water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's Island on the so-called back channel, within the said high water mark was washed away
6 from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is the land above high water mark, became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind, thereover.

Some years ago the United States Government, in the interest of navigation and in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below said Brunot's Island known as the Davis Island Dam. The effect of this dam was to very decidedly increase the depth of the water in the channel back of Brunot's Island, and to cause the water of the river to flow higher upon the land of your Orator, and to submerge same to a far greater extent and in fact to make said water which submerged your Orator's land navigable at certain times, and for certain purposes, which water was not navigable before the construction of said dam.

V.

And your Orator now shows unto your Honors that heretofore, to wit, on or about the 29th day of January, 1895, the Honorable Daniel S. Lamont, then Secretary of War for the United States, claiming to act by authority and in pursuance of Section XII of the Act of Congress of the United States, approved September 19, 1890, entitled "An Act making appropriation for the construction, repair and preservation of certain public works on Rivers and Harbors and for other purposes," did fix and establish a Harbor Line along the shores of said Brunot's Island, as shewn upon the map constituting said Exhibit B. That the said Secretary of War, being informed of and knowing the fact, that the said shore of the said Brunot's Island had been washed away by floods and freshets,
7 and the land partly submerged, as hereinbefore set forth, and claiming to have the right so to do established said Harbor Line over and across your Orator's land, in so far as said line runs within the Commissioners' High Water Line, and laid out said Harbor Line with appropriate monuments to indicate the course thereof.

VI.

Your Orator further alleges that although said submerged land was generally covered by water, it was not ordinarily navigable water, and does not and has never constituted, nor does it now constitute a part of the public navigable waters of the United States, and that no authority was conferred or intended to be conferred by said Act of Congress of September 19, 1890, upon the said the Honorable Secretary of War to regulate or interfere with the use of said land by the establishment of harbor lines for or upon the same, and to enforce the observance, as hereinafter shown, the said defendant has acted and is acting in excess of and beyond any authority conferred upon him by said Act, or any lawful authority in the premises.

Your Orator further avers that even if said water, which has submerged the said land of your Orator, was in fact part of the public navigable waters of the United States which had flowed upon the land of your Orator and submerged it without being rendered thus navigable by the construction of said dam as the proximate cause thereof, as hereinbefore set forth, that the said the Honorable Secretary of War had no right to run said line over said land, and thereby

to deprive your Orator of the use and enjoyment thereof, as hereinafter stated.

And your Orator is advised, and so states, that it now has as at all times it had the right to repair the damage caused by said floods and freshets, and the backing up and overflowing of said land, and to reclaim said submerged part as it might need the same by expelling the water therefrom and filling thereon or by piering and wharfing, keeping at all times within the lines of the part that had been torn away by the violence of the waters.

8

VII.

Your Orator further says that on February 23, 1907, the defendant, the Honorable William H. Taft, Secretary of War, claiming to have authority so to do by virtue of Section XI of the Acts of Congress, approved March 3, 1899, which is in the exact language of the 12th Section of the aforesaid Act of 1890, and notwithstanding the opposition and earnest protest of your Orator, undertook to, and did, approve and sanction a change in the establishment of the Harbor Line of 1895 along the back channel of the Ohio River at Brunot's Island, hereinabove referred to as having been fixed by the Honorable Daniel S. Lamont, Secretary of War.

It appears from the report of Major Sibert, the United States Engineer stationed at Pittsburgh, who reported to the Honorable the Secretary of War, (the defendant) advising the change in the Harbor Line of 1895, that conditions of high and low water had not changed since 1895, but that as at a portion of said shore the 1895 Harbor Line ran several hundred feet outside high water mark as it then existed, that it seemed advisable to change said Harbor Line so as to coincide with the actual high water mark. This change was made as indicated on the plat filed herewith, above referred to and marked Complainant's Exhibit B.

A certified copy of said report, with the order of the Secretary of War, dated February 23, 1907, confirming and approving the same and establishing said Harbor Line of 1907, is herewith filed marked "Complainant's Exhibit C," and prayed to be taken as part hereof.

9

VIII.

Further complain*ant* your Orator shows unto your Honors that recently, in order to facilitate the delivery of coal for the operation of a power-house for the manufacture of electricity, constructed on said island, your Orator desired to reclaim and use a part of it which had been covered and partly submerged by water, by establishing a coal-wharf at a point on the back channel of the Ohio River on said Brunot's Island, where both the harbor line of 1895 and the harbor line of 1907 run some distance landward of the said State Commissioners' high water line. According to the plans for said wharf prepared for your Orator by its engineers, the said wharf or pier will extend out over your Orator's land, but crossing both of said harbor lines to the said Commissioners' high water line. While your Orator was engaged in perfecting said plans, the said defendant, through his representatives, to wit, the Engineer Officer of the

United States Army at Pittsburgh, declared to your Orator that it had no right to build upon its said land across either of the said harbor lines, and notwithstanding the fact that said harbor lines ran over, and do run over the land of your Orator above the high water line as established by the said State Commissioners, the said defendant, through his said agent and representative refuses to allow your Orator to reclaim its land or to build its wharf upon its land outside of the harbor line of 1907, and threatened that if it undertook to do so, he would prevent it and cause your Orator to be prosecuted and its employees to be prosecuted and fined by the authorities of the Federal Government for said violation of the said Acts of Congress, approved September 19, 1890, and *and* March 3, 1899, hereinbefore referred to, said action being taken by the said defendant upon the pretended authority of the said Acts of Congress,
10 above referred to, and your Orator believes and charges that it will be subjected to criminal prosecution in each and every attempt on its part to reclaim and use any and all parts of the island which hitherto have been torn away by the violent and unusual action of the water.

Moreover your Orator avers and charges that even if the Secretary of War had authority to lawfully fix and establish the said Harbor Line of 1895, as fixed and established by him, in virtue of said Act of Congress approved September 19, 1890, yet in doing so he exhausted the power and authority to establish a Harbor Line at that place contained in said Act, and said Act confers no power or authority whatsoever upon the then Secretary of War, or the present Secretary of War (this defendant) to change or disestablish said Harbor Line of 1895 and establish the new Harbor Line of 1907, but the pretended establishment of the said Harbor Line of 1907 is absolutely unauthorized and without warrant at law on the part of said defendant.

IX.

Further complaining your Orator shows unto your Honors that because of the severe penalties prescribed by said Act of Congress, approved September 19, 1890, and said Act of Congress approved March 3, 1899, amendatory thereof, for the construction or erection of any buildings or wharves or piers outside of any harbor line established by the Secretary of War, and by reason of the aforesaid threats of the defendant to cause your Orator and its servants and agents to be prosecuted and subjected to said penalties and punishments in the event of your Orator carrying out its said plan to reclaim said submerged land by placing upon it the structures aforesaid, and because of the intention of said defendant to carry out said threats, and the belief of your Orator that defendant will do so, your Orator is prevented from making any use whatever of its said property, and your Orator is advised and so charges that said
11 action on the part of said defendant in establishing said harbor lines and in threatening to prosecute your Orator as aforesaid and preventing your Orator from using its said property, constitutes a taking of said property for public use without just compensation in violation of the rights of your Orator or as secured

by the Fifth Amendment to the Constitution of the United States and that any endeavor on the part of your Orator, so long as said harbor line remains unmodified and in effect, will subject your Orator to a multiplicity of criminal prosecutions, and your Orator is advised and says that the said harbor line, under the circumstances and by reason of the facts aforesaid, have become and are a cloud upon your Orator's title to said lands.

X.

And your Orator further complains and says that owing to the establishment of said Harbor Lines as above set forth, and owing to the action of the Honorable the Secretary of War, his representatives and his agents in preventing your Orator from using and enjoying his said land outside of said Harbor Lines, that this his said land, by the sanction of the said action of the Secretary of War, will from now on be used by the public, seeking to navigate the water which has submerged same, unless relief be afforded your Orator by this Honorable Court, and that thereby your Orator in the course of time will suffer irreparable damage by the creation in the public of prescriptive rights thereto.

XI.

Your Orator further shows that the land outside of said harbor line of 1907 belonging to your Orator and of the use and benefit of which your Orator has been deprived, and is being deprived by the action of the defendant, as aforesaid, is in excess of 12 acres
12 in extent and is of a value of more than $5,000.00 per acre.

XII.

That your Orator is without any adequate or complete remedy at law, and that the interposition of a Court of Inquiry is required for its protection in the premises.

To the end, therefore, that the defendant may answer this amended Bill of Complaint and that a decree may be passed by this Honorable Court adjudging and declaring—

(*a*) That the Harbor Line established in the year 1895 by the then Secretary of War in so far as the same encroaches upon the land of your Orator inside of high water mark as established by said State Commissioners be declared null and void, and the action of the Secretary of War in establishing the same to that extent, be annulled and cancelled.

(*b*) That the Harbor Line established by the defendant in the year 1907, in so far as it encroaches upon the land of your Orator as the boundaries of said land were fixed by said State Commissioners be adjudged and declared to be null and void, and the said order of the defendant of the 23rd day of February, 1907, ratifying and approving the report establishing said Harbor Line, be adjudged and decreed to be null and void.

(*c*) That by perpetual injunction on final decree, the defendant, Honorable William H. Taft, Secretary of War as aforesaid, all of

his agents, attorneys, servants and representatives be perpetually enjoined and restrained from instituting or causing to be instituted, any criminal proceedings against your Orator or its agents or servants, because of its reclamation and occupation of said land or the building thereon of your Orator, or its agents or servants,
13 or from otherwise interfering with your Orator's use and occupation of said land.

And that your Orator may have such other and further relief as its case may require, may it please your Honors to grant unto your Orator the writ of injunction, addressed to the said defendant, the Honorable William H. Taft, Secretary of War of the United States, restraining and prohibiting the said defendant, his agents, servants and attorneys in the manner aforesaid; and also a writ of subpœna, addressed to the said defendant, commanding him on a day certain to appear and be in this Honorable Court to answer this Bill of Complaint and abide by and perform such orders and decrees in the premises as to this Court shall seem proper and meet according to the principles of equity and good conscience.

PHILADELPHIA COMPANY,
By J. H. REED, *President.*

Attest:
[SEAL.] W. B. CARSON, *Secretary.*

REED, SMITH, SHAW & BEAL,
MARBURY & GOSNELL,
MORGAN H. BEACH,
Solicitors for Complainant.

WM. L. MARBURY,
Of Counsel.

(Endorsed.)

We consent to this *filing* of the within amended bill, protesting all questions of jurisdiction.
23 Jan., 1908.

DANIEL W. BAKER,
U. S. Att'y.
STUART McNAMARA,
Ass't U. S. Att'y.

14 COMPLAINANT'S EXHIBIT A.

Filed September 11, 1907.

ROB'T ELIOTT & ELIE WILLIAMS, EXD.

The Commonwealth of Pennsylvania to all people to whom these presents shall come, Greeting:

Whereas, upon the Application of *John Hamilton* of the *County of Alleg-any*, the Right of Preemption to a certain Island in the *River Ohio*, in the County aforesaid commonly called or known by the name of *Chartiers*, or *Hamiltons Island*, CONTAINING *one hundred & thirty six acres & twenty one perches* of land was granted

to him by our Supreme Executive Council on his paying for the same at the rate of *fifty shillings* per acre in Certificates of this State—And whereas the purchase money at the rate aforesaid amounting to the sum of *three hundred & forty Pounds, six shillings & three pence* has been fully paid into the *Office* of our *Receiver General,* as by his certificate dated the twelfth day of the present month appears—& whereas the said *John Hamilton* by an Instrument in writing under his hand & Seal duly executed bearing date on the twenty ninth day of December in the year of our Lord one thousand seven hundred & eighty nine conveyed all his right & title of in & to the said Island, unto *Robert Elliott & Elie Williams* of the said County, in fee simple. Now know ye that we for & in consideration of the said sum of *Three Hundred & forty pounds six shillings & three pence* in certificates of this State duly
15 paid as aforesaid, have given, granted & confirmed & by these presents, do give grant & confirm unto the said *Robert Elliott & Elie Williams* their Heirs & Assigns the aforesaid *Island,* Situate in the *River Ohio,* in the County aforesaid CONTAINING *one hundred & thirty six acres & twenty one perches* of land be the same more or less with all the rights, privileges & appurtenances thereto belonging. To have & to hold, the said *Island* hereby granted with the appurtenances unto the said *Robert Elliott & Elie Williams* their heirs & assigns to & for the only proper use, benefit & behoof of the said *Robert Elliott & Elie Williams,* their heirs & assigns forever according to the Acts of Assembly in such case made & provided—

Witness His Excellency *Thomas Mifflin, Esqr.,* President of our Supreme Executive Council who by virtue of certain Powers & authorities to him for this purpose granted hath hereunto set his Hand & caused Our Great Seal to be hereunto affixed in Council at *Philadelphia,* this *thirteenth* day of *March* in the Year of Our Lord *one thousand seven hundred & ninety* & of the Commonwealth, the *Fourteenth.*

(I-rolled 16th March 1790.)

THOS. MIFFLIN. [S.]

Attest:
CHARLES BIDDLE, *Sec'y.*

(Endorsed.)

In testimony, That the within is a copy of a Patent as Recorded in Patent Book P Volume 17 page 117 remaining in the De-
16 partment of Internal Affairs of Pennsylvania, I have hereunto set my hand and caused the Seal of said Department to be affixed, at Harrisburg, this third day of September A. D. 1907.

[SEAL.]

HENRY HOUCK,
Secretary of Internal Affairs.

Compared by—
J. C. KIRK.
R. C. DE WALD.

(Here follows map marked p. 17.)

MAPS

TOO

LARGE

FOR

FILMING

18 COMPLAINANT'S EXHIBIT C.

Filed September 11, 1907.

UNITED STATES (Vignette) OF AMERICA.

WAR DEPARTMENT, WASHINGTON, *May* 17, 1907.

I hereby certify that the attached are true copies of papers of record in the office of the Chief of Engineers, United States Army.

FREDERIC V. ABBOT,
Acting Chief of Engineers.

Be it known that *Frederic V. Abbot*, who signed the foregoing certificate, is the Acting Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this Seventeenth day of May one thousand nine hundred and Seven.

[SEAL.] ROBERT SHAW OLIVER,
Asst. Secretary of War.

19 *Harbor Lines at Pittsburg, Penna.*

UNITED STATES ENGINEER OFFICE.
CUSTOM HOUSE, CINCINNATI, OHIO, *January* 22, 1895.

Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: The Board of Engineer Officers constituted by S. O. No. 87, H. Q. C. of E., December 20, 1890, as amended by S. O. No. 3, par. 11, A. G. O., January 5, 1892, by S. O. No. 50, H. Q. C. of E., October 15, 1892, and by S. O. No. 18, par. 2, H. Q. C. of E., April 24, 1893, to consider and report on the subject of harbor lines in Pittsburg harbor, and on both sides of the Ohio River as far down as Davis Island Dam, have the honor to submit the following report.

At the outset, it would seem proper to state some of the circumstances which have caused such length of time to be consumed in the proper investigation of, and report on what has been found to be a very complex problem.

It was assumed that a fair solution of the problem of fixing the harbor lines would consider the wishes, as nearly as possible, of all parties interested in the matter, which included property owners on the banks and river interests. This of course necessitated many compromises, as in many cases, interests were conflicting. The in-

20 dustries lining the banks of what is called the harbor of Pittsburg, at the present day, are of national importance. Many of them, involving investments of hundreds of thou-

sands of dollars, are built on made ground, far within the original bed of the river; and, to arbitrarily set back the bank lines, in such cases, might cause an immense loss to vested interests. On the other hand, the continued encroachments in the bed of the river have undoubtedly increased the cost and danger of shipping by river, particularly at high stages of water; and changed the flow of floods. The Pittsburg coal shipping industry, which sends its coal to market by river, is the greatest in the country. To paralyze this, is to injure the entire Ohio and lower Mississippi valleys.

The Board, therefore, determined that it would be necessary to construct accurate maps on a large scale, based on accurate surveys of each river, within the adopted limits. These would show exactly, the existing state of affairs, viz: height of bank at various points above low water, contour of river, and location of all existing plants, railroads and bridges. The total length surveyed by river is about 26 miles, or 52 miles of bank line; and to secure the requisite accuracy in the field work and plotting of the maps, a long time, and considerable expenditure of money was needed. Meantime all parties concerned were to leave everything in status quo.

Next it was necessary to obtain the opinions of all parties concerned. As might be expected there were many; and from the mass of conflicting claims, to work out a feasible plan has required a great deal of study, and in a number of cases it was found advisable to change lines after they had been laid down. In addition
21 to this, but one member of the original Board still remains, (it having been necessary to change the senior member once, and the junior twice) and the Assistant Engineer in immediate charge of the work was seriously ill for a number of months.

History.—The Board first met in open session at Pittsburg on January 6, 1891, the three members at that time being Lieut. Col. W. E. Merrill, Maj. D. W. Lockwood, and Lieut. C. E. Gillete, Corps of Engineers, U. S. A.

After a preliminary consideration of the subject the Board directed the surveys and preparation of the maps, and adjourned.

The surveys and maps having been completed, other public meetings were held at Pittsburg, November 8 and 9, and December 20 and 21, 1893, the membership of the Board being the same as at present. At these meetings, all parties interested, were requested to explain by drawings, or otherwise, what was desired. A public examination of the bank lines was made by the Board, December 21, 1893. Representatives of the Pittsburg Coal Exchange, and of the leading manufacturing industries and railways were present at all public meetings, and presented their views both orally and in writing, but many parties interested in the subject did not appear at these meetings, and presented their claims afterwards.

Subsequently numerous meetings were held at Cincinnati, for discussion and study, and in order to obtain a satisfactory solution of the problem. A detailed description of the facts and prin-
22 ciples which guided the Board, may not only prove valuable for future reference, but is necessary to properly understand its conclusions in the present case.

Limits of Harbor Lines.—The harbor of Pittsburg, along both banks of which the lines are to be established, is considered to extend up the Monongahela River from its mouth to the City limits of Pittsburg or the Homestead Bridge; and up the Allegheny to the public water works. The City limits of Pittsburg extend somewhat higher up on the Allegheny than these water works, but the river banks are practically unoccupied beyond, and to terminate the lines there appears satisfactory to every one. On the Ohio, the lines are required to be established, on both sides, as far down as Davis Island Dam.

Local Characteristics.—The Allegheny and Monongahela Rivers, which unite to form the Ohio at Pittsburg, rise in districts widely separated, one in central New York, the other in southern West Virginia. The climatic and other features of the two river basins differ materially, and the resulting effects at Pittsburg and vicinity are extremely variable. The manufactories and railroads occupy a strip of comparatively low ground, lining the river banks, and which was originally only a few hundred feet wide. Back of this, on both sides of each river, rise precipitous hills, from three to six hundred feet high. The Point at Pittsburg was probably at an early day low ground, subject to overflow at ordinary stages. The Allegheny is at present an open river, but within the limits here considered, will soon be converted into a pool at low water by the construction
23 of the dam at Herr Island. The Monongahela is canalized for a considerable distance, Lock No. 1 being located about 2 miles above the Point Bridge. Pool water below is maintained by the Davis Island movable dam, which gives about 6.0 feet on the Market Street gauge.

Encroachments.—There being a lack of good sites, suitable for buildings and transportation facilities along the rivers, it early became the practice to get rid of the refuse of mills by filling up the low bottoms where any existed, and afterwards by filling the river bed itself. Loud complaints of this proceeding were made by the river men, and resulted in the establishment by the State of Pennsylvania in 1858 of a Commission to fix lines, in the endeavor to keep these encroachments within bounds. Little or no attention, however, seems to have been paid to these old state lines. A comparison of the maps of the present day with those of an earlier date shows astonishing encroachments on the river bed, made by enterprising manufacturers determined to increase their acreage and, at the same time, dispose of their refuse. The railroads, also, have taken their right of way out of the river, and have gradually converted their trestling into solid ground. Between 6th and 15th Streets, Pittsburg, the width of the Monongahela River has been reduced one-half, at other points about 30 per cent, and in one case a public levee has been occupied and entirely destroyed, the filling being continued outside, until two openings between piers of a neighboring bridge, and through which the river at low water always passed, have been permanently closed. Above and below
24 Lock No. 1, Monongahela River, through which all the coal traffic passes, the encroachments have almost entirely closed

the entrance to the inner and larger Lock. On the Ohio, the encroachments are less serious, but, in the vicinity of the Glass House Ripple, they have caused a great deal of complaint.

Demands of Navigation Interests.—In general, representatives of the navigation interests stated, that if the lines were located so as to prevent future filling, and certain extremely bad points were removed, they would be satisfied; but they demanded that the indentations of the bank lines, at high as well as low water, should be preserved as far as possible, on the ground that they were absolutely needed as harbors for the handling of their flats at various stages of the river. Property owners did not violently object to this basis of compromise, but there were a number of cases where a still further filling was desired. Where it was deemed absolutely necessary, and injury to navigation would not result, this has been provided for in the location of the lines.

Methods pursued in location of Lines.—After giving careful consideration to all conflicting claims, it was not difficult to locate the lines roughly on the ground as it exists. But this is a small part of the problem. The main question is how to establish the bank lines so that they shall be absolutely fixed for all time, and their location easily found. The importance of this matter becomes evident, if one attempts to lay down the old state lines from their vague description.

The following general principles governed the Board in
25 their conclusions on this subject:

First, the lines should be plainly and simply describable, in order to avoid legal controversy. This permits only the use of regular plane lines and curves, and the Board decided to employ none except those having straight lines or circles for their horizontal projections.

Second, not merely a line is needed but the bank slope must be defined up to at least ordinary high water mark. This can be done by establishing a second line at a known difference of elevation from the first, or by assuming a bank slope. The first plan was used by the old State Commission, but the Board decided to adopt generally the second, as being less confusing on the map. The slope usually assumed is that of one on three, which was believed to be safe with the material here used for filling. The only cases of the use of two lines are where it was deemed best to vary from this fixed slope, as at the entrance of Lock No. 1, Monongahela River, and at public levees. At such points, the slope is in some places determined by two lines, shown in projection on the maps, and whose difference of elevation is assumed to be 20 feet.

Third, the regulating line, in order that its relation to the top of existing banks may be clearly understood on the maps, should be, approximately in a water surface for an adopted reading on some well established gauge; and the greatest complication of all arises from the fact that this water surface cannot be assumed as horizontal, and any line adopted will never show the water surface for a given
gauge reading but once, unless the same conditions are re-
26 peated, which is particularly unlikely at Pittsburg, where three rivers affect the result. The gauge adopted by the

Board is the old established one, in the Monongahela River, at the foot of Market Street, Pittsburg, its zero being quoted in the Signal Bureau Reports, as 696.986 feet above sea level.

Fourth, what water surface is assumed as the regulating line, is of minor importance, but there are advantages in taking a high stage rather than a low one. By so doing, the line will usually be out of water, and if cross dams exist in the river, they may be considered as drowned, thus allowing the use of a single gauge for the entire harbor. In the present case, if a low water line was adopted, it would necessitate the use of two gauges, one above and the other below Dam No. 1, Monongahela River. The Board therefore assumed throughout, a reference line lying as nearly as possible in a plane tangent to the water surface, when the Market Street gauge reads 20.0 feet.

Fifth, to continue the bank slope of one on three indefinitely above ordinary high water would be absurd, as, in many cases, this would cut off the tops of existing buildings and prevent building on the slope. The Board, therefore, concluded to carry the slope only up to the 20 foot stage, ordinary high water, the top of the slope being the reference line. This stage is usually not much exceeded in floods, and then only for a few days. Any slope up to the vertical, can be allowed at points above this limit.

27 Sixth, the lines, being purely imaginary, must be located and described so that no variation is possible; and a mere horizontal projection on an official map is not sufficient. Two horizontal coordinates and one vertical, all referring to fixed origins, are absolutely necessary.

The Board adopted for their horizontal coordinates a system of offsets from secondary base lines, which last could be located from certain fixed primary bases, marked by permanent monuments.

It still remained necessary to obtain the vertical coordinate. As previously explained, the water surface adopted represented only one slope of the many possible for a given gauge reading, and to be known, its elevation above a fixed plane of reference should be given, at different points. To permit the use of the water surface at any stage, by simply allowing for the difference of reading on the adopted gauge, would only multiply the error; for it would not merely assume that a given gauge reading always corresponds to a given slope, but also that the rivers rose at all points exactly the same amount. This is so far from the truth, that at the same point, at different times, results might be obtained differing by several feet; and every foot in elevation means three feet horizontally. The Board was, therefore, forced to decide that points of the reference lines should be connected with permanent bench marks in the rear, and these last, with each other, and with the Market Street gauge, by accurate lines of level. These bench marks should be on permanent monuments, available for the use of neighboring property owners at any future time.

28 Conclusions.—The Board would therefore recommend: that the continuous black line, shown in projection, along each shore, on the official maps, be adopted as fixing the limits of the top of the bank slopes in Pittsburg harbor, along the banks of

the Allegheny, Monongahela and Ohio Rivers; that below this line a slope of one on three be adopted, except as hereinafter noted; this slope to be carried to the bottom of the river; that, in the exceptional cases, where a different slope is required, an additional outer line to fix the plane of the slopes, and shown in horizontal projection on the maps, be used; its reference being assumed as 20 feet below that of the upper or main harbor line; that within the limits names, and in front of the adopted slopes, no obstacle to the free flow of the water be permitted.

If the lines laid down by the Board are approved, it is recommended that the Board be authorized to have the necessary surveys made and monuments placed, to mark base lines to which the harbor lines may be referred, and an additional sheet or sheets will be added to the maps with necessary descriptions.

Respectfully submitted:

AMOS STICKNEY,
Lieut. Colonel of Engineers, U. S. A.
D. W. LOCKWOOD,
Major of Engineers, U. S. A.
H. E. WATERMAN,
1st Lieut. of Engineers, U. S. A.

29 1st Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *January* 26, 1895.

Respectfully submitted to the Secretary of War.

The subject of the establishment of harbor lines for Pittsburg Harbor, and for both sides of the Ohio River as far down as Davis Island Dam, has been under consideration by a Board of Engineer officers since December 20, 1890. The delay in making report has been due to the complex nature of the problem of fixing upon lines that would as near as possible meet the wishes of all parties interested in the matter. Conflicting interests necessitated many compromises, involving a great deal of study and a number of changes after lines had been agreed upon.

The Board has been careful and thorough in its consideration of the subject and submits the within report with a drawing, in 21 sheets, to which attention is respectfully invited. The Board recommends:

"That the continuous black lines, shown in projection, along each shore, on the official maps, be adopted as fixing the limits of the top of the bank slopes in Pittsburg harbor, along the banks of the Allegheny, Monongahela and Ohio Rivers; that below this line, a slope of one on three be adopted, except as hereinafter noted, this slope to be carried to the bottom of the river; that, in the exceptional cases, where a different slope is required, an additional outer line to fix the plane of the slopes, and shown in horizontal projection on the maps, be used; its reference being assumed as 20 feet be-
30 low that of the upper or main harbor line; that within the limits named, and in front of the adopted slopes, no obstacle

to the free flow of the water be permitted." The Board further recommends that if the lines are approved, authority be given to have the necessary surveys made and monuments placed, to mark base lines to which the harbor lines may be referred.

I concur in the views of the Board and recommend that the lines as laid down by the Board be approved, and that the Secretary place his approval both upon this report and upon the title sheet of the drawing.

THOS. LINCOLN CASEY,
Brig. Gen., Chief of Engineers.

2d Indorsement.

WAR DEPARTMENT, *January* 29, 1895.

Approved as recommended by the Chief of Engineers.

DANIEL S. LAMONT,
Secretary of War.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *July* 23, 1906.

Hon. Wm. H. Taft, Secretary of War.

SIR: 1. In letter of August 23, 1904, herewith, request is made by The Pittsburgh Coal Exchange for a modification of the
31 existing harbor lines on the back channel of the Ohio River at Brunot Island, just below Pittsburg, Pa.

2. The present lines at Pittsburg were approved by the Secretary of War January 29, 1895, and were determined by a Board of Engineers after extended study and investigation. The adopted lines followed quite closely the actual high-water banks of the rivers forming the harbor of Pittsburg, except in the channel back of Brunot Island, where the line at certain places is from 150 to 300 feet riverward of the pool line of the Davis Island Pool.

3. Advantage has not been taken by all riparian proprietors of their privilege to build out to the established harbor line, and experience has shown the desirability of retaining as much as is reasonably possible of the natural width of the river between its high-water banks, in order to avoid aggravating the conditions disadvantageous to navigation which even now are felt with the river in flood.

4. At the point where it is proposed to modify the harbor lines the river bed is in essentially the same condition as it was at the time the present lines were established, and it is believed that any material contraction of this channel would result in injury, and produce conditions detrimental to navigation and harborage.

5. The changes proposed consist in withdrawing the existing line landward toward Brunot Island at the upper end and toward the south shore, or mainland in the vicinity of Chartiers Creek at the lower end of the island. It is also proposed to leave an opening in the line at the mouth of Chartiers Creek, a small navigable tributary, where formerly a continuous line was drawn.

32 6. These proposed changes have been carefully considered by the local engineer officer, and thoroughly discussed by the interested parties at a public hearing, and appear to be acceptable to all parties except the Philadelphia Company, the present owner of Brunot Island.

7. The objections urged by these parties are in the main briefly stated as follows: First, that the Secretary of War once having established a harbor line has, under the law, no authority to modify or change it; second, that the change in harbor line in front of their property would, if made, deprive them of a portion of their property, or at least, cast a cloud upon the title of the company to the area immediately affected. It is believed that these objections should not obtain. With reference to the latter objection it may be said that it is the opinion of this office that the establishment of harbor lines neither creates nor destroys any proprietary rights; but merely fixes a limit beyond which structures injurious to the interests of navigation will not be permitted. The location of such lines in some cases, therefore, may grant a valuable privilege, but confers no inherent right.

8. As opposed to the first objection, I beg to invite attention to an opinion of the Attorney-General of June 8, 1899, in which it is held that the Secretary of War has the power to modify, as well as establish, harbor lines, if in his judgment, such action is required in the interest of commerce and navigation "even though its exercise should injuriously affect riparian owners and their property"
33 (W. D. 1565/8, 1899).

9. In the present case the proposed modification is requested in the interest of commerce and navigation, and in the opinion of the district officer, such changes are necessary in preserving and protecting the harbor of Pittsburg.

10. Concurring in the views of the local officer, I recommend that the modified harbor lines delineated and described on the accompanying tracing be approved by the Secretary of War, and that the Secretary indicate his approval on said tracing, which has been prepared for his signature.

11. In addition to the protest and argument against the action above recommended, attention is respectfully invited to a request of the attorneys of the Philadelphia Company for a hearing before final action in the matter, and to letter of the Assistant Secretary of War notifying them that they would be advised upon receipt of the report of this office. It is suggested, if the Secretary of War decide to accord them a hearing, that representatives of the river interests and of The Pittsburg Coal Exchange be permitted to be present and express their views.

Very respectfully,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

34 THE PITTSBURG COAL EXCHANGE,
No. 8 MARKET ST.,
PITTSBURGH, PA., *August 23rd*, 1904.

Major W. L. Sibert, Corps Engineers, U. S. A., Pittsburg, Penn'a:

DEAR SIR: Every flood in our local streams shows very clearly that there is not sufficient outlet for the accumulated waters of the Allegheny and Monongahela Rivers under present conditions, not to mention the conditions that will undoubtedly prevail if filling is ever made out to the harbor lines established by the Board of Engineers for the Pittsburg harbor several years ago.

As is a matter of common knowledge and as mentioned in the report of the board above referred to, the rivers in the vicinity of Pittsburg have been narrowed from one-fifth to nearly one-half their original and natural width by encroachments made by mills, railroads, &c. This contraction of the streams was directly responsible in the ice break-up last January, for the loss to river commerce amounting to hundreds of thousands of dollars.

The conditions at present are exceedingly bad, but to keep them from getting worse, we would respectfully ask that the harbor lines established by former official action, along the back channel side of Brunots Island be changed and moved back towards Brunots Island, approximately as shown by the blue print attached hereto. This change being that contemplated, as we understand it, by the
35 Act of Congress, which provides that the Secretary of War may establish such lines whenever it is made manifest to him that it is necessary for the protection and preservation of navigation. We think we can show conclusively, if given an opportunity at a public hearing, the necessity for this change.

Very respectfully yours,

THE PITTSBURG COAL EXCHANGE,
By J. FRANK TILLEY, *Ass't Secretary.*

1st Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *Oct.* 11, 1905.

Respectfully forwarded to the Chief of Engineers, U. S. Army.

1. The change in harbor line requested in this communication of The Pittsburgh Coal Exchange was considered on Sep. 8, 1904, together with an application from The Pittsburgh & Lake Erie Railroad Co. dated July 14, 1904, asking for a change of harbor line opposite the lines involved in this communication. The communication from The Pittsburgh & Lake Erie Railroad Co. was modified on Sep. 18, 1905, and the report on that communication will be forwarded separately from this but should be considered with this.

2. The adopted harbor lines in the Pittsburg Harbor followed quite closely the actual high water banks of the Ohio, Allegheny and Monongahela rivers, except in the back channel of Brunot Island. Through this channel a uniform width was laid out
36 and apparently little or no attention was paid to the high water banks. It will be noted that the present established

harbor line on the Brunot Island side of the back channel, in question, where it crosses the Ohio Connecting Railroad bridge, is between 200 and 300 feet riverward of the pool line of Davis Island pool, and is more than 150 feet from the pool line at places in the bend of the river, just above and below the mouth of Chartiers Creek. The lines as established have not been filled out to, and the river bed on the Brunot Island side, and in the bend referred to is in essentially the same condition as it was at the time of the establishment of the present harbor lines. It would, in my opinion, be a detriment to navigation should the banks be extended out to the lines now established. This back channel is part of the harbor of Pittsburg and in this connection this office attaches considerable importance to the following statement at the public hearing by the representative of the Pittsburgh Coal Exchange: "People who have observed river conditions know that when we make straight lines and uniform curves, we permit the water to reach the highest velocity possible, while the nooks which were formerly in the stream afforded landing places and served as deterrents to a swift current, and afforded places of refuge for steamboats and river craft in time of flood and ice. Speaking of navigation interests, Pittsburg is a harbor in addition to the navigation that takes place up and down the stream, and it being a harbor naturally implies that harborage should be provided."

3. Pittsburg suffers annually from floods and in my opinion any material contraction of the channel immediately below the
37 city would result in general injury and would produce conditions detrimental to navigation and to harborage, and it is respectfully recommended that the changes in the established harbor lines shown and described on the map inclosed herewith be made, such changes being necessary in preserving and protecting the harbor of Pittsburg.

4. The location of the proposed harbor lines recommended in this communication is within the bed of the stream as it exists as a physical fact. This office understands that the establishment of a harbor line can neither add to nor take from a man's property, the limits of the same being determined by the State laws, so long as such lines are within the bed of the stream.

5. Exhibit A is a typewritten reproduction of the stenographic record of the oral part of the hearing. Exhibit B is an opinion from the attorneys for The Pittsburgh & Lake Erie Railroad Co., concerning the right of the Secretary of War to change harbor lines after the same have been once established. Exhibit C comprises certain affidavits, a protest presented by the Philadelphia Company against the change in question, and a letter from the Monongahela Water Co. Exhibit D comprises a copy of notice which was posted in conspicuous places and sent to the parties named in list thereon.

WM. L. SIBERT,
Major, Corps of Engineers.

38 2d Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *February* 13, 1906.

Respectfully returned to Major Sibert for such changes or alterations as may seem necessary or desirable, reference being had to the accompanying memorandum.

To be returned.

By command of Brig. Gen. Mackenzie:

H. F. HODGES,
Major, Corps of Engineers.

3d Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *March* 10, 1906.

Respectfully returned to the Chief of Engineers, U. S. Army.

1. As to Item 1 of the memorandum, an opening has been made in the harbor line at the mouth of Chartiers Creek, and the map and description have been changed accordingly.

2. The records of this office show that the slight differences in coordinates referred to in item 2, arise from the fact that after the report of July 21, 1899, on change of harbor line at Jacks Run, Ohio River, was forwarded, a small error was found in the computation of some of the coordinates of the new harbor line. The coordinates were corrected on the harbor line sheets here, but, as the differences were so small, it was not thought necessary at
39 that time to report them to the Washington office. A blueprint showing these corrections is sent herewith. (No. 9 harbor line changes).

3. The azimuth, Race Track—Lead Plug, should be 130° instead of 138°. Mistake was made when copying from original computations, and not noticed in checking.

4. The remaining differences result from the following: The greater portion of the stations and reference points of the 1891 survey, which survey was the basis of the present establishment of harbor lines, are gone. In the work of locating and changing harbor lines it was found necessary to re-triangulate a portion of the Ohio River in 1902-3. This re-triangulation started from the stations at Davis Island Dam now named "Origin–"Abutment," which stations were simply lead plugs and unnamed in the original survey. This triangulation extended up stream, considering the entire width of the river to the line "Bridge–Light," and in the main channel to the line "Quaker–Dike." Connections were made where possible with stations and reference points of the 1891 survey, but when the coordinates of these were calculated from the 1902-3 work, slight differences were found to exist between such coordinates and those of the 1891 work. In 1904, it was found necessary to re-triangulate the remaining portion of the river beginning at the junction of the Monongahela and Allegheny rivers. In this survey

the stations "Union"–"Point" were used as the base line and the coordinates of 1891 assumed. This triangulation extended down the river to the line "Bridge–Light." The coordinates of the same stations deduced from the work from these two surveys vary slightly and each of them vary slightly with the coordinates of points of the 1891 survey where the same were taken in. The result of all this is slight differences that can not be corrected in any way except by making a new survey entirely and recomputing the coordinates of all points and readopting coordinates of all stations.

5. It should be borne in mind that this work is really tertiary triangulation and that it is not considered precise work. Only the angle-equation adjustment of quadrilaterals is made. The transits used for this work have least reading of 20″ in one instance and 30″ in another. In some of the work a 100-ft. tape was used without spring balance and without any consideration of temperature.

6. In correcting the tracing showing proposed change of harbor line, returned herewith, the 1903 coordinates of the stations "Bridge"–"Light" have been adopted instead of the 1904 coordinates first used, and azimuths and distances from these stations were recomputed where necessary and made to agree with the coordinates given on the tracing.

WM. L. SIBERT,
Major, Corps of Engineers.

FEB'Y 23, 1907.

I approve the change and do not think the hearing necessary. A hearing has already been had.

WM. H. TAFT,
Sec. War.

5th Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *February* 26, 1907.

1. Respectfully returned to Major Sibert, inviting attention to the action of the Department in this case.

2. Major Sibert will take such measures as in his judgment may seem best to communicate this action to the parties interested.

3. A blueprint and brown negative of the chart showing the approved modified lines are herewith and may be retained in the district engineer office.

By command of Brig. Gen. Mackenzie:

H. F. HODGES,
Major, Corps of Engineers.

6th Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *March* 4, 1907.

Respectfully returned to the Chief of Engineers, U. S. Army. The parties interested in the within matter have been notified by

circular letter, copy inclosed, of the authorized change of harbor lines.

WM. L. SIBERT,
Major, Corps of Engineers.

42 9912/135.

Proposed Change of Harbor Lines at Brunots Island, Pa.—Ohio River.

Memorandum.

FEB. 3, 1906.

1. Consideration of the question of leaving an opening in the harbor line at the mouth of Chartiers Creek, is suggested. That stream is described as "navigable in fact for at least a mile above its mouth." (Indorsement of Major W. L. Sibert, Aug. 23, 1905, on 56647.)

2. There are slight differences between some of the coordinates given for the points on the north side, and the coordinates of the same points given on the modified harbor line sheet approved Aug. 21, 1899, viz:

9912/135	AUG. 21, 1899.
P. C. y 5424.04	y 5424.02
P. T. y 5267.82	y 5267.90

3. Discrepancies are noted as follows, between lines given, and the same lines obtained by computation from the co-ordinates, viz.:

	Given.	Computed.	
Race Track–lead plug.....	138° 37′ 03″	130° 37′ 03″	
Dike–Light.....	74° 58′ 51″	74° 54′ 54″	
	2.9632628	2.9632802	
Island–Light	160° 03′ 00″	160° 02′ 35″	
	3.0275557	3.0271353	
Light–Quaker.....	176° 21′ 29″	176° 20′ 46″	
	2.8878229	2.8884057	
Tannery–Light.....	357° 09′ 28″	357° 09′ 12″	
Brush–Bridge	175° 54′ 39″	175° 53′ 04″	
	3.2021546	3.2019239	
Gunnegie–Bridge.....	134° 57′ 29″	134° 56′ 04″	
	3.2996997	3.2996626	
43 Car-Works–Jones.....	192° 01′ 09″	192° 01′ 19″	Arrow omitted.
Bridge piers:			
	48° 06′ 46.6″	48° 06′ 14.2″	
	138° 09′ 38″	137° 58′ 50″	
	138° 03′ 34″	137° 56′ 13″	
	138° 03′ 34″	137° 56′ 08″	
Bridge–Baker.....		Arrow should be reversed.	

Reed, Smith, Shaw & Beal.

PITTSBURGH, *March 25th*, 1907.

Subject: *In re* Change of Harbor Lines at Brunot's Island, Ohio River.

Hon. William H. Taft, Secretary of War, Washington, D. C.

SIR: We have been informed, that on February 23rd, 1907, the Secretary of War approved certain changes in the harbor lines in the Back Channel of the Ohio River at Brunot's Island in the city of Allegheny, Pennsylvania, in accordance with the recommendation of William L. Sibert, Major, Corps of Engineers, United States Army. We represent the Philadelphia Company, the owner of the Island. This Company purchased this land in 1896, after the establishment by a former Secretary of War of harbor lines, and the changes which you have made take from this Company 9.1015 acres of land (embraced within the line of the property purchased) of the assessed value for the purpose of taxation of $5,000 an acre. In 1904 we filed with Major Sibert for transmission to the Secretary of War, affidavits showing our property line on the Back Chan-
44 nel side of the river, and at the same time filed a written brief or protest against any changes, and requested an opportunity to be heard before the Secretary finally acted in the matter. We wrote the Secretary, inclosing a printed copy of this protest and request for a hearing, but we received no acknowledgement of the receipt of this protest. We also inclosed a copy of the printed brief or protest to the Chief of Engineers at Washington, who acknowledged receipt of it. We were therefore somewhat surprised when we learned that the harbor line on the North side of the Back Channel had been so radically changed, taking away from the Company such a large quantity of land.

We were informed by counsel representing another Company deeply interested in this matter, that he had written to the Chief of Engineers, and had been informed that the papers in this matter had been mislaid; hence we fear that our affidavits and the protest could not have been received and examined by you. We feel that we ought not to be deprived of this property without a full hearing as to our rights, and we respectfully request a hearing and reconsideration.

Yours very truly,

REED, SMITH, SHAW & BEAL.

1st Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *April* 1, 1907.

1. Respectfully returned to the Secretary of War.

2. The change in the harbor lines on the Back Channel,
45 Ohio River, at Brunots Island, referred to within, was approved by the Secretary of War, February 23, 1907, as will

be seen by reference to fourth indorsement on inclosure 3 of 10460 W. D., 1905, herewith.

3. The objections urged by the Philadelphia Company were fully set forth and discussed in my letter of July 23, 1906, presenting the case to the Secretary of War, and are understood to have been considered by him. The request of the Company's attorneys for a special hearing was also brought to his attention, and it appears from the aforesaid indorsement that he decided that such hearing was unnecessary. The action of the Department was taken, therefore, after a careful consideration of all questions involved, and, in my opinion, the case should be considered *res judicata*.

4. The statute confers on the Secretary of War authority to establish harbor lines whenever in his judgment such establishment is essential to the preservation and protection of navigable waterways, and the Attorney General has held that the power to establish also includes the power to modify.

5. The fixing of harbor lines in pursuance of the Federal Statute is not a taking of private property but simply the regulation of the use of such property, and it is believed the Federal Government, by virtue of its paramount control over navigable waters, has the power to make such regulation. In any event, the Secretary of War, in modifying the Brunots Island harbor lines, has simply performed a duty imposed upon him by Congress, and the legality and constitutionality of his act can be tested in the courts.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

46 *Demurrer.*

Filed March 31, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Term.

Equity. No. 27348.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Complainant,

vs.

WILLIAM H. TAFT, Secretary of War, Defendant.

Comes now the defendant, William H. Taft, Secretary of War, and showing to the Court that it does not appear by the amended bill of complaint filed herein that there is any jurisdiction in this Court over the subject matter set out therein, or that by reasons of the allegations of the said bill any jurisdiction in this Court over this defendant to grant the relief prayed, or any relief whatever, says that the said bill is bad in substance, and demurs to the same, upon the grounds, among others, following:

1. This proceeding is virtually a suit against the United States.

2. This Court has no jurisdiction to restrain the enforcement of a penalty or prosecution for violation of law.

3. This Court has no jurisdiction to restrain the defendant
47 from instituting criminal proceedings against complainant.

4. This Court has no jurisdiction to declare or define harbor lines or boundary lines of land outside the District of Columbia and in the State of Pennsylvania.

5. There is no jurisdiction in this Court to pass any decree removing cloud upon an alleged title of complainant in realty in the State of Pennsylvania, nor to accomplish the same by declaring the harbor lines referred to in the bill null and void.

And for other grounds.

DANIEL W. BAKER.

DISTRICT OF COLUMBIA, *ss:*

William H. Taft, being first duly sworn according to law, on oath says that he has read the foregoing demurrer by him subscribed, and knows the contents thereof, and declares that the same is not interposed for delay.

WM. H. TAFT.

Subscribed and sworn to before me this 28th day of March, A. D., 1908.

[SEAL.] JNO. B. RANDOLPH,
Notary Public, D. C.

I, Daniel W. Baker, Solicitor for the defendant in the above entitled cause, say that in my opinion the foregoing demurrer is well founded in law.

DANIEL W. BAKER.

48 Supreme Court of the District of Columbia.

THURSDAY, *October* 15, 1908.

The Court resumes its session pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

No. 27348, Equity Docket 60.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania,
vs.
WILLIAM H. TAFT, Secretary of War.

It appearing to the Court, that the defendant, William H. Taft, has resigned from his office as Secretary of War, and that Luke E. Wright, has been regularly appointed thereto and has qualified as such Secretary of War, it is this 15th day of October, 1908, ordered, on the application of complainant and with the assent of the United States Attorney, that the said Luke E. Wright as said Secretary of War, be substituted as defendant hereto and that this cause be maintained against him as the successor in office to the original defendant.

49 *Opinion.*

Filed November 24, 1908.

In the Supreme Court of the District of Columbia.

No. 27348. Equity.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Complainant,
v.
WILLIAM H. TAFT, Secretary of War, Defendant.

The complainant, a Pennsylvania corporation, which has its principal place of business in Pittsburgh by its bill herein seeks to enjoin the Secretary of War from instituting, or causing to be instituted, criminal proceedings against it, for attempting the reclamation and occupation of certain ground claimed by it near Brunot's Island, in the Ohio River, near Pittsburgh, which Island the complainant owns.

It also seeks to have the court declare null and void the act of the Secretary of War in establishing harbor lines in said river, in the years 1895 and 1907, so far as the said harbor lines encroach upon the land of the complainant inside of the high water mark, established by Commissioners under a statute of Pennsylvania.

This island was originally granted by the Commonwealth of Pennsylvania in 1790, without description by metes and bounds, and the former owner, by riparian right, claimed to the water line; but it is stated that the boundaries were definitely and permanently defined and established under the act of the Pennsylvania Assembly, of April 16, 1858, entitled, "An Act Establishing High and Low Water Lines in the Allegheny, Monogahela, and Ohio Rivers, in the vicinity of Pittsburgh."

That under this act, and the Commission provided for therein, the lines of actual ordinary high water and low water were established and fixed; and it is claimed that these became final
50 and stable boundary lines between the owner of the island, and the owner of the land under the waters of the river; and that the said island thereby became absolutely the property of the then owner up to such high water line; and that if thereafter any accretions should be acquired to the said island beyond the high water line, they would not belong to the owner of the island but to the state; and that if any diminution of the land by avulsion or erosion should take place, that the owners of the island would still be entitled to replace and reclaim the same, and to own and occupy up to the fixed boundary so established.

The bill also states that since the establishment of said boundary lines, a considerable portion of the main land of the island has been from time to time washed away by heavy floods and freshets.

That some years ago, in order to increase the depth of water in

the harbor of Pittsburgh, the United States Government built a dam across the Ohio River, a short distance below the island, known as the "Davis Island Dam," the effect of whic hwas to increase the depth of water in the Back Channel, and to make the water flow over upon the complainant's land, and which in effect did make the water in the Back Channel navigable at certain times, when it was probably not so navigable before the construction of said dam.

That in 1895, Daniel S. Lamont, the then Secretary of War, claiming to act under Section 12 of the act of Congress, approved September 19, 1890, (26 Statutes-at-Large, 426), fixed a certain harbor line along the shores of complainant's island, and across the high water line; and that such action on his part was unlawful; and that it had the right to repair any damage caused by floods and freshets, and the backing up and overflowing of the water,
51 and to reclaim any part submerged, by filling in, or by building piers or wharves over the same, and across said harbor lines, so long as it kept within the lines so established under said Commission.

The bill also avers that on February 23, 1907, William H. Taft, as Secretary of War, claiming to act under Section 11 of the Act of Congress approved March 3rd, 1899, (30 Statutes-at-Large, 1153), and against the protest of the complainant, approved and sanctioned a change in the harbor line established in 1895, and established the said harbor line to coincide with what was then claimed to be the actual high water mark.

The complainant operates a power house on said island, for the manufacture of electricity, and it desired to build a coal wharf at a point on the Back Channel of the river on its island, where the land had been partly submerged, and where the harbor lines of 1895 and 1907 ran some distance islandward of the high water line established by the said commission. The plans for this pier indicated that it would cross the said harbor line, but that it would be within the limits of the land of the island, as fixed by the Commissioners' high water line.

While perfecting these plans, the defendant, through his agent, the Engineer Officer at Pittsburgh, warned the complainant that it could not build on its land across the harbor lines, and refused to permit the complainant to reclaim its land, or to build its wharf outside of the harbor line established in 1907, and threatened prosecution of the complainant and its employees criminally, under the said acts of Congress, if they undertook to execute their said plans.

It is further stated that the area of the land outside of the harbor line in 1907, of the enjoyment of which the complainant is
52 deprived, is in excess of twelve acres, and the same is of the value of more than five thousand dollars per acre.

Complainant therefore claims that by the action of the defendant it is in effect deprived of its property, without just compensation, and that any attempt to use its property will subject it to a multiplicity of criminal prosecutions: and that under the circumstances the said harbor lines so unlawfully established, are a cloud upon its title.

After the bill was filed, Secretary Taft resigned, and Gen. Luke E. Wright succeeded him, and he was substituted as defendant herein.

A demurrer was interposed to the bill, in which several grounds are stated. First, it is claimed that this suit is virtually against the United States; second, that the court has no jurisdiction to restrain the enforcement of a penalty, or prosecution, for a violation of law; third, the court has no jurisdiction to restrain the defendant from instituting criminal proceedings; fourth, the court has no jurisdiction to declare or define harbor lines outside of the District of Columbia; and fifth, that there is no jurisdiction in this court to pass any decree removing a cloud upon the alleged title of complainant to land in the state of Pennsylvania.

The first question that seems to arise in this case is the apparent conflict between the boundary line fixed between the state of Pennsylvania and its citizen, under the Commission provided for in the said act of 1858, and the harbor lines established under the said acts of Congress.

It may have been competent for the state of Pennsylvania and a citizen of that state, by said Commission, to establish a boundary line as between themselves which would be permanent, but it is doubtful whether such a boundary line should be observed
53 by the United States when undertaking to regulate navigable waters.

Suppose, as an illustration, that the channels in the Ohio River in the course of years had become so changed that the whole island had been submerged, or washed away, and the actual navigable portion of the river had been over the place where it formerly was located. In that case, could it have been maintained that the Secretary of War had no power under the acts of Congress to change an established harbor line, or to regulate the navigable water in the new channel so created?

It seems to me that the power of the United States to regulate navigable waters in the interest of interstate commerce, and for the benefit of the whole people, cannot be limited by any agreement made between a state and one of its citizens; and that while the high water line established by the said Commission may have been permanent as between them, the Secretary of War, as representing the United States, must consider the actual condition of the water, in order to properly discharge the responsibility cast upon him.

If the owner of Brunot's Island had intended to preserve its land up to the boundary line as established by the said Commission, must it not have done so before allowing the water to become so deep as to be actually capable of being used for navigation, and before the extension of the harbor line, as provided by the said acts of Congress?

It is claimed in argument that perhaps the navigable waters within the said line were created by the dam built by the United States, called the "Davis Island Dam;" and it is intimated that such flooding of the island may be the cause of damage, for which the owner ought to have some relief. Whether this is true or not, it seems to

me can make no difference in this case, because the United States cannot be sued in this court; and if a claim of that kind ex-
54 isted, it would have to be presented to Congress, unless the Court of Claims should have jurisdiction thereof. If navigable water actually exists in said river, even if caused in whole or in part by said dam, it must be subject to regulation for safety and efficiency of navigation.

The relief asked for, with reference to removing a cloud from the title of the complainant, must necessarily fail, if the harbor lines sought to be annulled were lawfully established; and my view of the law is that authority to establish the same did exist, and that the said harbor lines were therefor- lawfully established; and that this court has no jurisdiction to declare the same null and void.

If, however, I should be wrong in this conclusion, it does not seem at all certain that the court, sitting in this District, has any jurisdiction to remove a cloud on land in Pennsylvania, by decreeing that the act by which the alleged cloud was created in the said state was invalid.

The further relief that complainant claims, is to have the Secretary of War enjoined from directing the law officers of the United States for the state of Pennsylvania to enter criminal prosecutions against it, for a threatened violation of the United States statutes.

The case of the Monongahela Bridge Company against Taft, No. 25,310 Equity, which was heard before Mr. Justice Stafford of this court some months ago, and in which he wrote an opinion, denying the relief prayed for, (34 Washington Law Reporter, 278), holds that in a case of this kind the equity court will not undertake to enjoin a criminal prosecution. The decision in that case seems to have been based upon good authority; and I am disposed to follow the same upon that point in the present case, even if there was any question as to the validity of the harbor lines established by the Secretary of War. The said lines being held valid, however,
55 it must necessarily follow that a prosecution in a criminal court for building obstructions across the same, and over the navigable water, will not be enjoined by a court of equity.

Without considering any other points made in argument, I think, for the reasons above stated, that the demurrer must be sustained.

JOB BARNARD, *Justice.*

Decree.

Filed November 25, 1908.

In the Supreme Court of the District of Columbia.

In Equity. No. 27348.

THE PHILADELPHIA COMPANY, a Corporation, Complainant,

vs.

LUKE E. WRIGHT, Secretary of War, Defendant.

This case came on for hearing at this term of court upon the amended bill of complaint and exhibits thereto and the demurrer

to the said bill, and was argued by counsel, and thereupon upon consideration thereof it is this 25th day of November, 1908,

Adjudged, ordered and decreed: That the injunction prayed for be and it hereby is denied; that the demurrer be and it hereby
56 is sustained, and that the bill of complaint be and it hereby is dismissed at cost of the complainant.

By the Court.

JOB BARNARD, *Justice.*

From the above decree the complainant in open court prays its appeal to the Court of Appeals of the District of Columbia, which is hereby allowed with bond for costs in the penalty of one hundred dollars.

JOB BARNARD, *Justice.*

Memorandum.

December 14, 1908.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed December 14, 1908.

In the Supreme Court of the District of Columbia, the 14th Day of December, 1908.

Equity. No. 27348.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Complainant,

vs.

LUKE E. WRIGHT, Secretary of War, Defendant.

The complainant having appealed from the order entered
57 in the above cause on the 26th day of November, 1908, designates the following parts of the record which it desires to be included in the transcript of appeal, Viz:

1. The amended bill.
2. Exhibit *A* to original bill.
3. Exhibit *B* to original bill.
4. Exhibit *C* to original bill.
5. Order substituting Luke E. Wright as defendant.
6. Demurrer of defendant.
7. Order sustaining demurrer and dismissing bill.
8. Opinion of Mr. Justice Barnard.
9. This notice.

The Clerk of the Court will please prepare the transcript in pursuance of the above order given this 14th day of December, 1908, copy of which is served upon the Solicitor for the defendant, as appears from his acceptance hereunder written.

MORGAN H. BEACH,
Solicitor for Complainant.

Service of the copy of the above order for making up the transcript of appeal accepted this 14th day of December, 1908.

DANIEL W. BAKER,
STUART McNAMARA,
Solicitors for Defendant.

58 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 57, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27348 Equity, wherein Philadelphia Company, a corporation of Pennsylvania, is Complainant, and Luke E. Wright, Secretary of War, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of January, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1982. Philadelphia Company, a Corporation of Pennsylvania, appellant, *vs.* Luke E. Wright, Secretary of War. Court of appeals, District of Columbia. Filed Jan. 27, 1909. Henry W. Hodges, clerk.

33 In the Court of Appeals of the District of Columbia, January Term, 1909.

No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
LUKE E. WRIGHT, Secretary of War.

Comes now the Philadelphia Company, by counsel, and shows to the Court that Luke E. Wright has resigned from his office as Secretary of War, and that Jacob M. Dickinson has been regularly appointed and has duly qualified as such Secretary of War, and moves the Court to allow this appeal to be maintained against said Jacob M. Dickinson, as Secretary of War, in the place and stead of the original appellee.

PHILADELPHIA COMPANY.
MORGAN H. BEACH,
Counsel for Appellant.

Due service of copy of the above motion is accepted and acknowledged by the undersigned United States Attorney in and for the District of Columbia, who hereby consents that the order of substitution above moved may be made.

DANIEL W. BAKER,
U. S. District Attorney, Counsel for Appellee.

(Endorsed:) No. 1982. In the Court of Appeals of the District of Columbia. January Term, 1909. Philadelphia Company, a corporation of Pennsylvania, Appellant, *vs.* Luke E. Wright, Secretary of War. Motion to substitute Jacob M. Dickinson. Court of Appeals, District of Columbia. Filed Mar. 18 1909. Henry W. Hodges, Clerk.

34 TUESDAY, *April 6th, A. D.* 1909.

No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
LUKE E. WRIGHT, Secretary of War.

The retirement of Luke E. Wright and the appointment of Jacob M. Dickinson as Secretary of War having been suggested, It is upon motion of Mr. Morgan H. Beach, attorney for the appellant, now here ordered by the Court that the said Jacob M. Dickinson, Secretary of War, be and he is hereby made the party appellee in this cause in the place and stead of Luke E. Wright, retired.

WEDNESDAY, *April 7th, A. D.* 1909.

No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
JACOB M. DICKINSON, Secretary of War.

The argument in the above entitled cause was commenced by Mr. W. L. Marbury, attorney for the appellant, and was continued by Mr. Stuart McNamara, attorney for the appellee.

35 THURSDAY, *April 8th, A. D.* 1909.

No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
JACOB M. DICKINSON, Secretary of War.

The argument in the above entitled cause was continued by Mr. D. W. Baker, attorney for the appellee, and was concluded by Mr. Morgan H. Beach, attorney for the appellant. On motion, the appellant is allowed to file an additional brief herein, if so advised.

36 No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
JACOB M. DICKINSON, Secretary of War.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

The Philadelphia Company filed its bill in the Supreme Court of the District of Columbia against Wm. H. Taft, then Secretary of War, to obtain an injunction. The bill alleges that complainant is the owner in fee of a tract of land known as Brunot's Island, in the Ohio River within the County of Allegheny, in the State of Pennsylvania, and within the city limits of the city of Pittsburgh in the said county. That said island was originally granted to Robert Elliot and Eli Williams by the Commonwealth of Pennsylvania, March 13, 1790, the patent containing no description of said island by courses and distances; that the title to the same subsequently passed from Elliot and Williams by various conveyances and finally became vested in complainant, and is now, including the land submerged or covered by water hereinafter mentioned, in the possession and occupancy of complainant. That on April 16, 1858, an act of the legislature of the State of Pennsylvania was passed to establish

high and low water lines in the Allegheny, Monongahela and Ohio Rivers, in the vicinity of Pittsburgh. Under said act commissioners were appointed to determine the boundary lines of land along the shores of said rivers and islands within the same. Said commissioners, in accordance with said law, located the lines of ordinary high and low water marks on said shore including said Brunot's Island, which said findings were duly approved by a court as required in said act. That by virtue of said proceedings the right of the owners of Brunot's Island to any accretions beyond the lines established by said commissioners was taken away, and at the same time said line being the permanent boundary of said island, its owners were no longer subject to any loss or diminution of land by reason of the same being submerged through the avulsion of floods or freshets or through gradual erosion; that is to say, the imperceptible washing away of the shore. That by virtue of said proceedings and subsequence conveyances hereinbefore referred to, complainant became the owner of said island, including any submerged part thereof, according to the plat of said commissioners which is made an exhibit to the bill. That subsequently to the establishment in 1865 by said commissioners of the line of high-water mark, a considerable amount of the soil of the shore of said Brunot's Island on the so-called back channel, within the said high-water mark, was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island—that is, the land above high-water mark—became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind thereover. That some years ago the United States Government, in the interest of navigation and in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below said Brunot's Island, known as the Davis Island Dam. The effect of this dam was to decidedly increase the depth of the water in the channel back of Brunot's Island and to cause the water of the river to flow higher upon the land of complainant and to submerge same to a far greater extent and in fact to make said water, which submerged complainant's land, navigable at certain times and for certain purposes, which water was not navigable before the construction of said dam. That on or about January 29, 1895, Daniel S. Lamont, then Secretary of War of the United States, claiming to act by authority of an act of Congress, approved September 19, 1890, fixed and established a harbor line along the shores of said Brunot's Island, as shown upon the map constituting an exhibit hereto. That the said Secretary, being informed of and knowing the fact, that the said shore of Brunot's Island had been washed away by floods and freshets and the land partly submerged, as hereinbefore set forth, and claiming to have the right so to do, established said harbor line over and across complainant's land, in so far as said line runs within the commissioners' high water line, and laid out said harbor line with
37 appropriate monuments to indicate the course thereof. That although said submerged land was generally covered by water, it was not ordinarily navigable water, and does not and has

never constituted, nor does it now constitute a part of the public navigable waters of the United States, and that no authority was conferred or intended to be conferred by said act of Congress upon the Secretary of War to regulate or interfere with the use of said land by the establishment of harbor lines for or upon the same; and to enforce the observance, as hereinafter shown, the said defendant has acted and is acting in excess of and beyond any authority conferred upon him by said act. That even if said water which submerged the said land of complainant was in fact part of the public navigable waters of the United States which had flowed upon the land of complainant and submerged it without being rendered thus navigable by the construction of said dam as the proximate cause thereof, as hereinbefore set forth, the Secretary of War had no right to run said line over said land and thereby deprive the complainant of the use and enjoyment thereof. That complainant is advised and so states, that it now has, as at all times it has had the right to repair the damage caused by said floods and freshets, and the backing up and overflowing of said land, and to reclaim said submerged part as it might need the same by expelling the water therefrom and filling thereon or by piering and wharfing, keeping at all times within the lines of the part that had been torn away by the violence of the waters. That on February 23, 1907, Hon. Wm. H. Taft, Secretary of War, claiming to have authority so to do by virtue of Section XI of the act of Congress, approved March 3, 1899, which is in the exact language of the twelfth section of the aforesaid act of 1890, and notwithstanding the opposition and protest of complainant, undertook to, and did, approve and sanction a change in the establishment of the harbor line of 1895 along the back channel of the Ohio River at Brunot's Island, hereinabove referred to as having been fixed by Secretary Lamont. That it appears from the report of the United States engineer in charge, who advised the change in the harbor line of 1895, that conditions of high and low water had not changed since 1895, but that as at a portion of said shore the 1895 harbor line ran several hundred feet outside high-water mark as it then existed, it seemed advisable to change said harbor line so as to coincide with the actual high-water mark. A certified copy of said report with the order of the Secretary of War dated February 23, 1907, confirming and approving the same and establishing said harbor line of 1907, is made an exhibit to the bill. That recently, in order to facilitate the delivery of coal for the operation of a power-house for the manufacture of electricity, constructed on said island, complainant desired to reclaim and use a part of it which had been covered and partly submerged by water, by establishing a coal wharf at a point on the back channel of the Ohio River on Brunot's Island, where both the harbor line of 1895 and the harbor line of 1907 run some distance landward of the said State commissioners' high-water line. That according to the plans for said wharf the same will extend out over complainant's land, but crossing both of said harbor lines to the said commissioners' high-water line. That while complainant was engaged in perfecting said plans, the defendant, through his representative, the engineer officer of the United States

Army at Pittsburgh, declared to complainant that it had no right to build upon its said land across either of the said harbor lines, and notwithstanding the fact that said harbor lines ran over, and do run over complainant's land above the high-water line as established by the said State commissioners, the said defendant, through his said agent and representative, refused to allow complainant to reclaim its land or to build its wharf upon its land outside of the harbor line of 1907, and threatened that if it undertook to do so he would prevent it and cause complainant to be prosecuted and its employees to be prosecuted and fined by the authorities of the Federal Government for violation of the acts of Congress approved September 19, 1890, and March 3, 1899, hereinbefore referred to, said action being taken by the said defendant upon the pretended authority of the said acts of Congress; and complainant believes and charges that it will be subject to criminal prosecution in each and every attempt on its part to reclaim and use any and all parts of the island which hitherto have been torn away by the violent and unusual action of the water. That even if the Secretary of War had authority to lawfully fix and establish said harbor lines of 1895, as fixed and established by him, in virtue of said act of Congress approved September 19, 1890, yet in doing so he exhausted the power and authority to establish a harbor line at that place con-
38 tained in said act, and said act confers no power or authority whatever upon the Secretary of War to change said harbor line of 1895 and establish the new harbor line of 1907, but the pretended establishment of the harbor line of 1907 is absolutely unauthorized and without warrant of law. Complainant further avers that because of the severe penalties prescribed by said act of Congress for the construction or erection of any buildings, wharves, or piers outside of any harbor line established by the Secretary of War, and by reason of the aforesaid threats of the defendant to cause complainant and its servants and agents to be prosecuted and subjected to said penalties and punishments in the event of complainant carrying out its said plan to reclaim said submerged land by placing upon it the structures aforesaid, and the belief of complainant that defendant will do so, complainant is prevented from making any use of its said property, and complainant is advised and so charges that said action on the part of said defendant in establishing said harbor lines and in threatening to prosecute complainant and preventing complainant from using its said property, constitutes a taking of said property without just compensation in violation of the rights of complainant or as secured by the Fifth Amendment to the Constitution of the United States, and that any endeavor on the part of complainant so long as said harbor line remains unmodified and in effect, will subject complainant to a multiplicity of criminal prosecutions, and it is advised and says that the said harbor line, under the circumstances and by reason of the facts aforesaid, has become and is a cloud upon complainant's title. That owing to the establishment of said harbor lines, and owing to the action of the Secretary of War, his representatives and agents, in preventing complainant from using and enjoying his said land outside of said harbor line, said land, by

the sanction of the said action of the Secretary of War, will from now on be used by the public, seeking to navigate the water which has submerged same, unless relief be afforded complainant by this court, and that thereby complainant will, in the course of time, suffer irreparable damage by the creation in the public of prescriptive rights thereto. That the land outside of said harbor line of 1907 belonging to complainant and of the use and benefit of which complainant has been deprived and is being deprived by the action of the defendant, as aforesaid, is in excess of twelve acress in extent and is of a value of more than $5,000 per acre. That complainant is without any adequate or complete remedy at law, and the interposition of a court of equity is required for its protection in the premises.

The prayers of the bill are: that the harbor line established in 1895, in so far as the same encroaches upon the land of complainant inside of high-water mark as established by the State commissioners, be declared null and void, and the action of the Secretary of War be annulled and canceled; (2) that the harbor line established by defendant in the year 1907, in so far as it encroaches upon the land of defendant, as the boundaries of the same were fixed by said State commissioners, be adjudged and declared to be null and void, and the order of the defendant ratifying and approving the same be adjudged and decreed to be null and void; (3) that by injunction on final decree, the defendant, all of his agents, attorneys, servants and representatives, be perpetually enjoined and restrained from instituting or causing to be instituted any criminal proceedings against complainant or its agents or servants, because of its reclamation and occupation of said land or the building thereon, or from otherwise interfering with complainant's use and occupation of said land.

Section 11 of the act approved March 3, 1899, provides that: "Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established beyond which no piers, wharves, bulkheads, or other works shall be extended, etc. * * *

"SEC. 12. That every person and every corporation that shall violate any of the provisions of sections 9, 10 and 11 of this act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of said section 11 shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding twenty-five hundred dollars, nor less than five hundred dollars, or by imprisonment, in the case of a natural person, not exceeding one year, or by both such punishments, in the discretion of the court."

The defendants entered a demurrer to the bill setting up the following grounds (1) the proceeding is virtually a suit against the United States; (2) this court has no jurisdiction to restrain the enforcement of a penalty for violation of law; (3) this court has no jurisdiction to restrain the defendant from instituting criminal proceedings against complainant; (4) this court has no jurisdiction to declare or define harbor lines or boundary lines of land outside the District of Columbia and in the State of Pennsylvania; (5) there is

no jurisdiction in this court to pass any decree removing cloud upon an alleged title of complainant in realty in the State of Pennsylvania, nor to accomplish the same by declaring the harbor lines referred to in the bill null and void.

39 Before action upon this demurrer, Secretary Taft resigned the office of Secretary of War and Luke E. Wright was appointed in his stead and was substituted for him as a defendant in the case. Thereafter, the court sustained the demurrer of the defendant and ordered the bill dismissed. From that decree complainant appealed. Pending appeal, the said Luke E. Wright vacated the office of Secretary of War and J. M. Dickinson, his successor, has been substituted as a party in his stead.

The jurisdiction to entertain this bill is brought in question by the demurrer on several grounds.

1. The first of these is that the suit though nominally against the Secretary of War is in reality against the United States.

Assuming, from the allegations of the bill, that the complainant is the owner of the submerged land to the line established by the Pennsylvania commissioners, that the establishment of the harbor line thereon is an invasion of its property rights, and that the threatened action of the Secretary of War would work an irreparable damage thereto, we are of the opinion that this objection is not well founded.

An unconstitutional statute, in the execution, or by the authority of which an officer of the United States would violate the rights and privileges of a citizen, affords no justification for his acts; and he can not shield himself from the consequences of such acts on the ground that his action is taken solely in the interest, and on behalf of the United States. The United States are not necessary parties to an action to recover possession of property so unlawfully taken and held, or to restrain trespasses that would work irreparable injury. U. S. *v.* Lee, 106 U. S., 196, 220; Pennoyer *v.* McConaughy, 140 U. S., 1, 10; *In re* Tyler, 149 U. S., 164, 190; Tindall *v.* Wesley, 167 U. S., 204, 212; Am. School of Mag. Healing *v.* McAnulty, 187 U. S., 94, 108; *Ex parte* Young, 209 U. S., 123, 151; Krupp *v.* Crozier, 36 W. L. R., 646.

2. The second and third grounds of objection are, that a court of equity has no jurisdiction to restrain proceedings in a criminal court, or to restrain a person from instituting criminal proceedings.

The general rule is well settled that a court of equity has no jurisdiction to enjoin criminal proceedings, but there is an equally well established exception to this rule. It is, that where property rights are involved, and threatened with destruction through the instrumentality of an unconstitutional law, the jurisdiction of a court of equity will not be ousted by the fact that the government has chosen to assert its power by indictment or other criminal proceedings. Davis *v.* Farnum Mfg. Co., 189 U. S., 207, 218; Dobbins *v.* Los Angeles, 195 U. S., 223, 241; *Ex parte* Young, 209 U. S., 123, 162.

No criminal proceeding has been instituted by the defendant or his authority. The complaint is, that he has threatened, and intends to take such a step upon the first actual attempt the complain-

ant shall make to extend its structures beyond the designated harbor line.

If a prosecution be commenced the question of the constitutionality of the act of Congress can be raised therein and carried for final determination to the court of last resort. If complainant should suspend operations depending such litigation, it would suffer no greater delay than will result from this form of proceeding. Even if it should continue its operations, it is not to be presumed that the Secretary of War would institute similar proceedings from day to day for the purpose of harassing and intimidating the complainant, while engaged, in good faith, in asserting its rights.

Assuming, then, that the jurisdiction would exist to stay the criminal proceedings, it is not apparent, from the facts alleged, that the complainant would be without adequate remedy at law. We will pass this question, however, and proceed to the consideration of the last objection which raises a more serious one.

3. That objection is that a court of equity in the District of Columbia has no jurisdiction to pass upon the title to, or decree or define the boundaries of land in the State of Pennsylvania; or to remove a cloud upon the title to said lands, as this claim of harbor rights is alleged to be.

The contention of the appellant is that the court, having jurisdiction of the person of the defendant, has the power to control his actions, notwithstanding the decree may incidentally affect the title to the land or the boundaries thereof.

We can not agree with this contention. The limitations of the equity jurisdiction *in personam* have been discussed at length by us in two recent cases to which we refer. Columbia Sand Dredging Co. *v.* Morton, 28 App. D. C., 288, 307; Irrigation, etc., Co. *v.* Hitchcock, 28 App. D. C., 587, 597.

40 In the first of those cases, the plaintiff, owning land on a stream in the State of Maryland, claimed title to the submerged land to the middle of said stream. The defendant, a private corporation of the District, was personally served with process therein. The complaint was that the defendant was engaged in removing sand from plaintiff's land in the stream, and that its trespass would work irreparable damage. The bill was dismissed because the principal question involved was the title to land in another jurisdiction.

In the second case jurisdiction was denied to enjoin the Secretary of the Interior from invading, and working irreparable injury to the plaintiff's land in the Territory of Arizona, in the execution of the general irrigation act of Congress. That case presented substantially the same question as this. The effect of the action of the Secretary of War is to deny the title of plaintiff to the submerged land outside of the designated harbor line. Assuming that the complainant acquired title to land between high and low water marks by grant from the State of Pennsylvania, the first question raised by the action of the officers of the United States is whether it holds that title subject to the public right of navigation, and the authority of the Government to regulate the use of it. See Gibson *v.* U. S., 166 U. S., 269.

273, and cases cited; Scranton *v.* Wheeler, 179 U. S., 141, 162. The second question is whether by gradual erosion of the land on the river and the undisturbed flow of the waters for so many years, the complainant has lost its right to now claim as land the part that is beyond the low-water mark, under any circumstances. This question of title is necessarily the fundamental question involved in the case, and ought to be tried in the State where the land is situated.

4. Upon the assumption that the complainant has an unquestioned title to all of the land claimed, it is alleged that the action of the Secretary of War has cast a cloud upon that title. It is true, as appellant contends, that a suit to remove cloud from title is *in personam*, and therefore maintainable only in that jurisdiction in which the defendant can be personally served with process, unless indeed, there be some statute converting it into a proceeding virtually *in rem*. Hart *v.* Sansom, 110 U. S., 151, 155; Arndt *v.* Griggs, 134 U. S., 316, 320; Lynch *v.* Murphy, 161 U. S., 247, 251; Dull *v.* Blackman, 169 U. S., 243, 247. But if we assume that the substantial purpose and effect of the decree sought in this case is to remove cloud from title only, it would then be subject to the first ground of objection to the jurisdiction, before stated. The cloud upon the title is not created by the threat of the Secretary to institute a criminal prosecution in case of any encroachment upon the harbor line, but by the act of Congress and the action long since taken in establishing that line. Consequently the cloud can not be removed but by a suit to which the United States are necessary parties; and they can not be sued without their consent.

Being of the opinion that the court below did not err in dismissing the bill, its decree will be affirmed with costs.

Affirmed.

41 TUESDAY, *May 4th, A. D.* 1909.

No. 1982.

April Term, 1909.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
JACOB M. DICKINSON, Secretary of War.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

May 4, 1909.

42 TUESDAY, *June 1st, A. D.* 1909.

No. 1982.

PHILADELPHIA COMPANY, a Corporation of Pennsylvania, Appellant,
vs.
JACOB M. DICKINSON, Secretary of War.

On motion of Mr. Morgan H. Beach, of counsel for the appellant in the above entitled cause, it is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

43 (*Bond on Appeal.*)

Know all Men by these Presents, That we, Philadelphia Company, a corporation of Pennsylvania, as principal, and The United States Fidelity & Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto Jacob M. Dickinson, Secretary of War, in the full and just sum of Three hundred (300) dollars, to be paid to the said Jacob M. Dickinson, Secretary of War, his successors, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between The Philadelphia Company, a corporation of Pennsylvania, aforesaid, as appellant, and Jacob M. Dickinson, Secretary of War, aforesaid, as appellee, a decree was rendered against the said Philadelphia Company, a corporation of Pennsylvania, and the said Philadelphia Company, a corporation as aforesaid having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Jacob M. Dickinson, Secretary of War, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Philadelphia Company, a corporation as aforesaid, shall prosecute said appeal to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PHILADELPHIA COMPANY, [SEAL.]

[Seal of Philadelphia Company.]

By J. H. REED, *President.*

THE UNITED STATES FIDELITY & GUARANTY COMPANY. [SEAL.]

HOWARD SHAW, *Attorney in Fact.*

[Seal of The United States Fidelity & Guaranty Company.]

Sealed and Deliver[illegible] in presence of—

H. D. ABELE.

Attest:

W. B. CARSON, *Secretary.*

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

6/7/09.

This bond seen & Satisfactory.

DANIEL W. BAKER,
Sol. for Appellee Dickinson, Sec'y, &c.

[Endorsed:] No. 1982. Philadelphia Company, a Corporation of Pennsylvania, Appellant, *vs.* Jacob M. Dickinson, Secretary of War. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 8, 1909. Henry W. Hodges, Clerk.

44 UNITED STATES OF AMERICA, *ss:*

To Jacob M. Dickinson, Secretary of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Philadelphia Company, a Corporation of Pennsylvania, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 8th day of June, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted.

DANIEL W. BAKER,
of Counsel for Appellee.

June 9, 1909.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 9, 1909. Henry W. Hodges, Clerk.

45 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 44 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Philadelphia Company, a Corporation of Pennsylvania, Appellant, *vs.* Jacob M. Dickinson, Secretary of War No. 1982, April Term, 1909 as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of April, A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,724. District of Columbia Court of Appeals. Term No. 498. Philadelphia Company, appellant, *vs.* Jacob M. Dickinson, Secretary of War. Filed June 14th, 1909. File No. 21,724.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1911.

PHILADELPHIA COMPANY,
A CORPORATION OF PENNSYLVANIA,
Appellant,

vs.

JACOB M. DICKINSON,
SECRETARY OF WAR.

No. 70.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR THE APPELLANT.

This case comes up on appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of said District (Barnard, J.), which latter decree sustains a demurrer of the Secretary of War, the defendant below, to the complainant's bill, and dismissed said bill.

STATEMENT OF THE CASE.

This is a suit in equity brought by the appellant, the Pennsylvania Company, in the Supreme Court of the District of Columbia against the Hon. William H. Taft, then

Secretary of War of the United States, to enjoin and prohibit him from taking certain property belonging to it (being the part of Brunot's Island which is now covered by water) under color of Acts of Congress authorizing the Secretary of War to establish harbor lines in the Ohio River at Pittsburgh, and to enforce observance of such harbor lines by persons owning property abutting upon said river.

As incidental to this main purpose, the Court is asked to declare the action of the Secretary of War in establishing the harbor lines in question void in order that the cloud which they, standing of record in the War Department in the District of Columbia as well as in Pittsburgh, cast upon plaintiff's title to the land, may be removed.

Secretary Taft having retired from the office of Secretary of War pending the suit, he was succeeded by Hon. Luke E. Wright, who in turn was succeeded by Hon. Jacob M. Dickinson, who in turn was succeeded by Hon. Harry M. Stinson, who has been properly substituted as appellee here.

The allegations of the bill are in substance as follows:

The appellant owns in fee and occupies an island in the Ohio River, which is now included in the City of Pittsburgh. It is the successor in title of certain citizens of Pennsylvania, who acquired it from the Commonwealth by letters patent dated March 13, 1790.

The actual lines of the island were not defined in the patent, and there was no plat of it then made; it was then called Chartier's or Hamilton's Island; was said to contain a certain area, and was granted as land, with all the rights, privileges and appurtenances thereto belonging.

It is now, and for some time has been, called Brunot's Island, and was until lately a part of one of the wards of the City of Allegheny, which is now merged into Pittsburgh.

The lines of the lands along the Allegheny and Monongahela Rivers, whose junction, at Pittsburgh, forms the Ohio

River, and along the Ohio itself, in the vicinity of Pittsburgh, were never clearly defined until the year 1865. At the present time many factories and railroads occupy a strip of comparatively low ground on the river banks, which was originally only a few hundred feet wide. Back of this, on both sides of each river, rise precipitous hills, from three to six hundred feet high. From lack of good sites, suitable for buildings and transportation facilities along the rivers, it early became the practice to get rid of the refuse of mills by filling up the low bottoms where any existed, and afterwards by filling the river bed itself. So much complaint was made of this that the subject was taken up by the Legislature of Pennsylvania, and because of its importance to property holders, to navigation and the people generally that their respective rights and privileges should be definitely ascertained, an act was passed "to establish High and Low Water Lines in the Allegheny, Monongahela and Ohio Rivers in the vicinity of Pittsburgh" (Act April 16, 1858, Pamphlet Laws, 326). By it certain proceedings were authorized and directed to be had in the District Court of Allegheny County, wherein the land and rivers lay, which were duly instituted and concluded some time in 1865.

These, in substance, were as follows: The Court appointed competent and disinterested Commissioners, who, after due notice to and full hearing of all parties interested, and after acquiring all possible information as to the exact high and low water mark, made a survey and map by which these lines were located, and returned the same to the District Court; thereupon the Court, after notice, heard all objections and confirmed and recorded the survey and map of the Commissioners.

By the express provisions of the act, the lines thus finally approved by the Court were forever thereafter to be deemed, adjudged and taken firm and stable for the purposes for

which they were made; and so they were declared to be by the Court's judgment.

The island's lines were considered with those of other properties, and its lines as thus fixed by the Court are claimed by the Philadelphia Company as the true limits of its holdings. That is to say, the Commonwealth having, in a judicial proceeding, defined the actual limits of the appellant's land, the lines thus fixed bounded the island so that it could not thereafter be increased by accretion or diminished by avulsion or erosion. While any subsequent addition to the island would not belong to its owners, they would, nevertheless, have the right to repair or replace any diminution or destruction of it up to those lines (from the shore). Some time after the establishment of these lines, however, part of the upland of the island on what is called the Back Channel, was washed away by heavy floods and freshets, so as to submerge that part without rendering it in any wise actually navigable. And at a still later period the depth of the water in this channel was materially increased by a dam built by the Government across the Ohio a short distance below the island, with the result that this submerged part was more deeply inundated at times, making it occasionally navigable where it never before had been.

In this condition of things, Secretary of War Lamont, though informed of and knowing these facts, established and marked out with suitable monuments, in 1895, a harbor line on the shores of the island, which ran well within and islandward of the Commissioners' lines; and again, over appellant's protest, Secretary of War Taft, in 1907, further encroached on its holdings by narrowing the Lamont lines and drawing them still closer islandward, and this was done notwithstanding there had been no actual change in high water since the location of the Lamont lines. It seems, however, to have been requested by the Pittsburgh Coal Exchange of Major Sibert, of the Engineer Corps, stationed at Pitts-

burgh, on whose recommendation the change was ordered by the Secretary.

This correspondence, with the protest of the appellant, appears in the Record (Record, pages 11-25), and will later be discussed more in detail.

The appellant operates a power house on the island for the manufacture of electricity, and had prepared plans by which it was proceeding to build a coal wharf at a point on the back channel where this submergence existed.

This wharf was inside of the Commissioners' line, but would have crossed both the Lamont and Taft harbor lines.

The engineer officer at Pittsburgh, acting for the Secretary of War, forbade the further prosecution of this work and refused to allow the appellants to either project its wharf or reclaim its land beyond the harbor line of 1907; and it was assured that any attempt to do so would be met with criminal prosecutions under the statute by which the lines were authorized to be established by the Secretary of War.

The appellant's complaint is that any effort on its part to exercise its right to repair, or to repel invasion of the river over its true lines, is thus threatened with a multiplicity of criminal proceedings to subject it and its employees to the risk of heavy penalties; while submission on its part to the limits as fixed may grow into a concession of the public right to use this submerged part.

The land, of the use of which it is thus deprived, is twelve acres in extent and valued at five thousand dollars an acre.

Under the facts recited, the appellant contends that it is virtually deprived of its property without due process and without just compensation, and that moreover a cloud is cast on its title which ought to be removed. It is asked that the line of 1895 and the lines of 1907, in so far as they encroach upon the land of the company inside of high-water mark as established by the State Commissioners, and the action of the

Secretary of War in establishing them be declared illegal and annulled; or that, at least, this relief be had as to the line of 1907, which is an unauthorized alteration of the then established line of 1895; that the defendant, on final hearing, be restrained and perpetually enjoined from instituting or causing to be instituted any criminal proceedings against the company or its servants, because of its attempted reclamation and occupation of its land or of its building thereon, or from otherwise interfering with its use and enjoyment.

To this bill the Secretary of War demurred on the grounds that the suit is, in effect, one against the United States; that there is no jurisdiction either to restrain criminal proceedings or to define harbor or boundary lines on, or to remove a cloud from title to, land outside of the District of Columbia. (Record, pages 25, 26.)

This demurrer was sustained and the bill dismissed by the Supreme Court of the District of Columbia, opinion by Barnard, J. (Record, p. 27). This decree was affirmed by the Court of Appeals of the District, opinion by Shepard, C. J. (Record, p. 34). From which decree of affirmance this appeal is taken.

This demurrer was sustained and the bill dismissed.

The exhibits to the bill are a copy of the letters patent (Record, page 9), a plat showing the island and the lines of the Commissioners and the harbor lines of 1895 and 1907 (Record, page 10), and the order of the Secretary of War, upon the report of the officer of Engineers, approving the change of 1907 in the previously established harbor line. (Record, pages 11-25.)

This report gives a history of the establishment and the change of harbor lines. The first harbor line was established after a report by a board of Officers of the Engineer Corps of the Army which was constituted in 1890 to consider and report on the subject. It consisted of a lieutenant-colonel, a

major and a lieutenant, and changed in personnel, though not in rank, during the five years of its existence, so that only one of the original board signed the report which was returned in 1895. On the recommendation of the then Chief of Engineers, Brigadier General Casey, Secretary of War Lamont approved the report January 26, 1895.

Nine years later, the Pittsburg Coal Exchange, as has been said, requested the engineer officer stationed at Pittsburgh, Major Sibert, to change this line along the back channel of Brunot's Island by moving it back towards and still closer to the island. This change Major Sibert recommended to the Chief of Engineers, then Brigadier General MacKenize, stating that the line on the Brunot's Island side of the back channel had not been filled out to, and the river bed on the Brunot's Island side was in essentially the same condition as in 1895. He expressed the opinion that it would be a "detriment to navigation should the banks be extended out to the lines now established." (Record, page 20).

General MacKenize in turn recommended the change to Secretary Taft. He stated (Rec. page 18) that Major Sibert had carefully considered it, a public hearing had been held, and it appeared acceptable to all parties *except the owners of the island, the Philadelphia Company.* This company had questioned and objected to the authority to make the change, after the line had been once established, and asserted that it was deprived of its property and that its title would be clouded. These objections General MacKenize advised the Secretary of War ought not to obtain as, in the opinion of his office, the establishment of harbor lines neither created nor destroyed any proprietary rights, but merely fixed a limit beyond which structures injurious to the interest of navigation will not be permitted. The location of such lines, he further advised, may grant a valuable privilege, but confers no inherent rights. An opinion of the Attorney General is cited, sustaining the authority of the Secretary of War to

alter an established harbor line; and he concludes that the Secretary evidenced his approval by signing the tracing submitted to him. He calls attention to the Philadelphia Company's protest and to the request of its counsel for a hearing before final action is taken; but he intimates, if this be granted, that the Pittsburg Coal Exchange and representatives of river interests should be permitted to be present.

By indorsement of the Secretary of War (Record, page 22), the change was approved and a hearing refused as unnecessary and as one had already been held.

Thereafter the Philadelphia Company, by counsel, when informed of this action again requested a hearing and a reconsideration of the Secretary of War, calling attention to the fact, among others, that this change took from the company, which had purchased the island in 1896, after establishment of the Lamont line, several acres of land embraced within the property purchased (Record, page 24). The endorsement of the Chief of Engineers thereon restates the reasons formerly given when recommending to the Secretary of War the approval of the change, and concludes that "in any event, the Secretary of War, in modifying the Brunot's Island harbor lines, has simply performed a duty imposed upon him by Congress, and the legality and constitutionality of his act can be tested in the Courts" (Record, page 25).

Errors in the Decrees Appealed From.

It is submitted that the Supreme Court of the District in the opinion accompanying same was erroneous in these respects (Record, pages 27-31):

(1) In holding that the State of Pennsylvania did not have the power to permanently fix the boundary line of Brunot's Island in the manner in which it was done under the

Pennsylvania statute of 1858, so as to prevent the owners of said island from losing the title and ownership to such portion of said island as might be submerged or washed away subsequent to the fixing of said boundary line, and thus entitle the owners of said island to fill up or otherwise occupy the submerged portion of said island. (Record, 29.)

(2) In holding that if the owner of Brunot's Island desired to preserve its land up to the boundary line as established by the Commission provided for in the Act of 1858, it was obliged to do so by building upon or filling up the submerged part before the water upon the same became deep enough to be actually used for navigation, and before the fixing of the harbor line as provided by the Acts of Congress. (Record, 29.)

(3) In holding in substance and effect that this is a suit to recover damages for the flooding of the land of the plaintiff caused by the erection of the Davis Island Dam by the United States Government, and that it is therefore a claim which must be presented to Congress or to the Court of Claims. (Record, 29-30.)

(4) In holding that the Secretary of War had authority to establish the harbor line mentioned in the bill of complaint over the plaintiff's property.

(5) In holding that the Supreme Court of the District had no jurisdiction to entertain a bill to enjoin the institution and prosecution of criminal proceedings against the Philadelphia Company, the owner of said Brunot's Island, under the circumstances set forth in the bill.

It is submitted that the decrees and opinion of the Court of Appeals of the District are erroneous:

(1) In affirming the decree of the Supreme Court of the District.

(2) In adjudging it to be doubtful whether the plaintiff may not have an adequate remedy at law.

(3) In adjudging that the Supreme Court of the District had no jurisdiction on the assumption that the title to the land in question was the fundamental question involved in the case.

Argument.

I.

Upon the facts stated in the bill of complaint and admitted by the demurrer the land lying inside the Commissioners' line of 1865 upon which the Philadelphia Company is seeking to build its power house is the absolute property of that company from which it has the right to exclude the water at any time by building upon it or otherwise, and with the full use of it the defendant has no right to interfere, under color of the Acts of Congress authorizing him to establish harbor lines—the interference of the defendant in this case being of such a nature as to amount to a taking of said property.

The Complainant, the Philadelphia Company, claims to be the absolute owner of this land, with the right at any time to exclude the water from it or any part of it by building upon it, as it was beginning to do when prevented by the Secretary of War, upon two distinct grounds:

(A) Because by virtue of the Pennsylvania Statute of 1858 and the proceedings of the Commissioners thereunder, set forth in Paragraph III of the Bill, the boundary of

Brunot's Island was permanently fixed and established at what was then the high-water line, so that no subsequent encroachment of the water, even though it had been by imperceptible degrees—*i. e.*, by erosion—could affect the rights of the owner of the Island; and

(B) Because the Commissioners established their line of high water at high-water mark *as it actually existed at that time* (1865), and, irrespective of the Statute of 1858, no loss of soil or submergence caused by heavy floods and freshets (avulsion), as set forth in the Bill, can affect Complainant's title, but it has the right at any time to repair the damage caused by said floods and freshets by embanking or building upon the submerged part of the land.

(A)

It is to be observed *in limine* that, while the land upon which the Complainant is seeking to build is at present covered by water, Complainant's right to build upon it does not rest, or in any degree depend, upon the fact that it is the owner of the adjoining upland or dry land, but upon the fact that it is the absolute owner of the submerged land itself, *with the right to exclude the water.*

This is not a case where the owner of land bordering upon a navigable stream is seeking to exercise the right of a riparian owner to build a wharf or other structure out to the channel—a right which can never be exercised except subject to such regulations as the State or the Federal Government may from time to time prescribe in the interest of navigation.

This land is Complainant's absolute property, subject to no right of navigation or other right on the part of the public in the water which for the time being covers it.

In 1865 the Complainant's predecessor in title, the then owner of Brunot's Island, certainly had absolute ownership

of the land of that island as far riverward as the then existing high-water mark. But the location of this high-water mark was constantly changing, owing to the shifting currents of a rapidly flowing river, such as the Ohio.

By the process of gradual accretion the dry land of that island along this Back Channel might, in the course of time, and a comparatively very short time, be extended so far out into the stream as to seriously interfere with navigation; while on the other hand, of course, the owners of the island were subject to the danger of having their boundaries narrowed and losing much land by the gradual and imperceptible wearing away of the same through the action of the water—*i. e.*, by *erosion*.

It was manifestly therefore in the interest of navigation, as well as for the protection of riparian owners, that the Legislature of Pennsylvania enacted the Statute referred to in the Bill of Complaint, being Chapter 363 of the Acts of 1858 (Pamphlet Laws, 326), as follows:

AN ACT

"To establish High and Low Water Lines in the Allegheny, Monongahela and Ohio Rivers, in the Vicinity of Pittsburg, in Allegheny County.

"Whereas, the lines of land on and along the shores of the rivers at and near the City of Pittsburg, in the County of Allegheny, have never yet been clearly ascertained, and as it is important to the owners of such lands, *the persons navigating the waters of*, and the corporations adjacent to such rivers, and to all parties interested to know and have their several rights and privileges in extension and limitation ascertained and defined; therefore,

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania

in General Assembly met, and it is hereby enacted by the authority of the same:

"That the District Court of the County of Allegheny be, and it is hereby, authorized and required at any time before the first day of June next, to order and appoint three discreet and disinterested freeholders as commissioners, none of whom shall reside on or be the owners of any lands abutting on the said rivers within the county aforesaid, who shall take and subscribe an oath or affirmation before some competent authority, well and faithfully to perform the duties required by this Act and to the best of their ability, without favor or partiality; and in case of the death, resignation or inability to act of any of the commissioners appointed as aforesaid before the intended purposes of this Act shall have been fulfilled, it shall be lawful for the said Court to appoint another or other persons, to supply such vacancy or vacancies, who being qualified as aforesaid, shall proceed and act as if appointed in the first instance.

"Section II. That the Commissioners appointed and qualified as aforesaid, after giving due public and timely notice of their time and place of meeting, for at least ten days, shall proceed, taking to their assistance an able and competent surveyor, and examine the shores, surveying and marking thereon lines of ordinary low water and lines of ordinary high water along the rivers Monongahela, Allegheny and Ohio, within the following limits, namely: from a line crossing Allegheny River, at the northeastern line of a borough of Sharpsburg; from a line crossing the Monongahela River, opposite the mouth of the Four-Mile Run; and from a line crossing the Ohio River, opposite the mouth of Woods Run, and round the shores of all the islands in the rivers aforesaid, and within the limits aforesaid, excepting such parts of said shores where said lines have been already

established by law; said lines of low and high water to be laid out along said shores aforesaid in such manner and position as will most perfectly secure and perpetuate the navigable channels of said rivers and best promote the safety and convenience of vessels, rafts and persons navigating the same, and as will be most suitable in all respects for the general benefit of the public at large.

"Section III. That the said Commissioners will hear parties interested, and examine under oath, administered by one of their number, experienced hydraulic civil engineers, scientific men and other persons, if they shall deem it necessary to enable them to obtain more accurate information in regard to flowing water in navigable streams, and in regard to the location of the lines aforesaid.

"Section IV. That the said Commissioners, when they shall have completed their services and shall have determined the limits and located the said lines of low and high water mark, shall cause to be made a correct map or plan of the same, with such description and explanation as may be necessary to a perfect understanding thereof, and shall return the same authenticated by their respective signatures and that of the surveyor to the District Court aforesaid; and it shall be the duty of the prothonotary of said Court to receive and file said map or plan in his office for public inspection and examination; and to give notice in at least three daily newspapers published in the City of Pittsburg, that on a day certain, to be appointed by the Court, the said Court will hear any objections which may be made thereto by any persons or parties who may consider themselves aggrieved by the adoption of the same; and the said Court, after hearing the objections, shall adjudge and determine whether the same shall be fully established or be

returned to the Commissioners, either in whole or in part, for their re-examination; and if so returned the said Commissioners shall proceed to reconsider the same, and thereafter shall return to the said Court in the manner aforesaid, said maps, with such alterations and amendments, if any, as they shall deem necessary and proper. The said Court, after such determination, shall direct said map or plan, either with or without such alterations as shall have been made, to be recorded, and thence after that the said map or plan so recorded shall be taken and allowed for the purposes herein mentioned and contained, and the lines so approved shall forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid.

"Section V. That all riparian rights now vested in the State, lying between high-water lines and the rivers, within the district aforesaid, shall from thenceforth thereafter be vested in the several corporations within whose limits the same now is or hereafter shall lie.

"Section VI. That the Commissioners who may be appointed under this Act shall each be entitled to receive five dollars per day for their services, and the expenses incurred in carrying into effect the provisions of this Act shall be paid out of the Treasury of said Allegheny County."

Now, it is alleged in the Bill and, of course, admitted by the demurrer, that the Commissioners appointed under this Act to ascertain and permanently fix the boundaries of Brunot's Island and thereby ascertain and make "stable and firm however" the respective rights of the owners of the island, on the one hand, and those of persons navigating its river—*i. e.*, the public, on the other, actually did fix said lines "exactly in accordance with the then existing high and low water marks on said shore." (Record, page 4.)

There would seem to be little room for doubt that the effect of this Act and the proceedings so taken thereunder was to secure to the owners of land along this river complete protection against any loss of their land or right to build upon the same because of any subsequet encroachment of the waters.

And, accordingly, it was so held in the case of Bridge Co. vs. Pfeil, 42 Pittsburg Leg. Journal, p. 18, where the Court of Common Pleas of Allegheny County, speaking through Ewing, Presiding Judge, says:

> "At the passage of this Act, the riparian owner owned absolutely to high-water mark and had a qualified property to low-water mark, and outside of low-water mark the title to the soil was in the State. It seems to us there can be no doubt that the State had the power to enact that thereafter the legal limits of the property should remain unchanged, either by gradual accretions or *gradual cutting away*. This, in our opinion, was intended to be done, as was done, by the Act of Assembly and the proceeding thereunder."

It has been settled by repeated decisions of the Supreme Court of the United States that on a question as to the rights of riparian owners on navigable waters which include the question of how far, if at all, their title to land shall be deemed to be affected by the action of the water, are determined and governed by the laws of the respective States:

Shiveley vs. Bowlby, 152 U. S. 1.
Barney vs. Keokuk, 94 U. S. 324.
St. Louis vs. Meyers, 113 U. S. 566.
Water Power Co. vs. Water Commissioners, 168 U. S. 349.
Packer vs. Bird, 137 U. S. 661.

In the State of Pennsylvania it is settled that the soil up to low-water mark in a navigable stream is the property of the Commonwealth.

Monongahela Bridge Company vs. Kirk, 46 **Penn. St. 112, 120.**

That being the case the power of the State of Pennsylvania to regulate and determine by law the effect which any change in the high and low water mark caused by the action of the water should have upon its title, and that of the riparian owner, would seem not fairly open to question, and, indeed, it has not until now been questioned in the present case.

> "The Courts of the United States will construe the grants of the General Government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attached to the ownership of property conveyed by the Government will be determined by the State, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner where the bounds are above the influence of the tide will be limited *according to the law of the State* whether to low or high water mark or will extend to the middle of the stream."
>
> Packer vs. Bird, *supra.*

In the case of Barney vs. Keokuk, 94 U. S. 324, 338, in the course of a discussion of the doctrine relatitve to the respective rights of the States and the riparian owners in the soil in navigable waters, the Court says:

> "Whether as rules of property it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. *If they choose to resign to the riparian pro-*

prietor rights, which properly belong to them in their sovereign capacity, it is not for others to raise objections."

So, in the case at bar, the State of Pennsylvania being the owner of the soil of the Back Channel of the Ohio River below low water mark according to the principles of the common law had a right to all additions to that soil caused by the gradual and imperceptible washing away of the shore of Brunot's Island, and the consequent moving landward of the low water mark.

But, by the Act of 1858 above quoted, the State chose to resign to the riparian proprietor, the owner of Brunot's Island, its right to such addition, requiring the said owner, at the same time, to surrender *in the interest of navigation* his right to any accretion which might have resulted from additions to the upland or alluvion caused by the action of the water.

So that, even though the washing away of the island or the submergence thereof between the Commissioners' line of 1865 and the present dry land of the island since said line was established, had been of imperceptible degrees or erosion, under the law of Pennsylvania, as thus established, the title and ownership of the owners of Brunot's Island in this part of the land would have remained absolutely unaffected.

Being such absolute owners they could, of course, at any time have repaired the damage caused by the encroachment of the water in any way they saw fit either by filling it up with earth again or by building wharves or structures of any lawful character upon it.

When the Davis Island Dam constructed by the Government at a lower point on the river caused the water to back up on this part of the island while the owner might or might not be entitled to recover any damages therefor against the Government in the Court of Claims, they had the abso-

lute right to protect their property by excluding the water at any time.

They had the same right to put such water out as they would have had to keep it out in the first instance.

Overflowing of the complainant's property caused by the construction by the Government in improving the harbor would be *damnum absque injuria,* but it has never been contended until now that the owner of the property would not have the right to protect himself against such injury if he could at his own expense either by excluding or expelling the water.

Monongahela Navigation Co. vs. United States.
148 U. S. 312, 336.

B.

But, even though the Pennsylvania Act of 1858 *had never been passed, upon the facts appearing in this case the title of the plaintiff as the owner of Brunot's Island to the submerged land lying inside islandward of the Commissioners' line of* 1865 *remains absolute.*

It is alleged in the bill, paragraph 4, and, of course, is admitted by the demurrer that:

> "Subsequent to the establishment in 1865, by said Commissioners, of the line of high-water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's Island on the so-called Back Channel, within the said high-water mark, *was washed away from time to time by heavy floods and freshets,* so that a large part of the upland of the island, that is the land above the high-water mark, became and was overflowed and soil submerged by water, but said land was not submerged to an extent to permit navigation of any kind thereof."

It may be freely admitted that according to the well established rule of law regulating the rights of riparian proprietors, if the waters of the river had encroached gradually and by imperceptible degrees upon the island, as it existed in 1865, so that the land now in dispute gradually became part of the bed of the river covered with navigable water, in the absence of any such statute as the Act of 1858 above quoted, the owners of Brunot's Island would have lost title to the land thus submerged and the same would have become the property of the State of Pennsylvania or the Municipality of Pittsburg.

But, when as here, instead of the submergence or loss of land being caused by the gradual and imperceptible encroachment of the water, it is caused by sudden floods and freshets, the law is equally well settled that the title of the owner of the island is not affected and that he may at any time exclude the water or occupy the land itself submerged in any way he pleases.

The authorities on this point are, of course, very numerous.

In Rex vs. Lord Yarborough, 3 Barn & C. 15, it said:

> "That accretion in an increase by imperceptible degrees, The Lord of the Manor Claims, when there is a gradual accession of land adjacent."

> "The test of what is gradual, as distinguished from what is sudden, seems to be that, though witnesses are able to perceive from time to time that the land has encroached on the sea land it is enough if it was done so that they could not perceive the progress at the time it was made."
>
> Angel, Tidewaters, 1st Ed. 71.

Of course when land is washed by heavy floods and freshets it is easy for witnesses to perceive the progress of the washing away.

"If the marine increase be by small and almost imperceptible degrees it goes to the owner of the land; but, if it be sudden and considerable, it belongs to the Sovereign."

Emans vs. Turnbull, 2 Johns, 314 S. C. 3 Am. Dec. 427.

2 Bl. Com. 261, Hargreave Law Tracts, 28.

"To acquire title to lands by alluvion it is necessary that its increase should be imperceptible. But, if the sea gradually and imperceptibly encroach upon private lands, or the bounds are lost and the situation and extent of the lost land cannot be ascertained * * *."

Gould on Water, Sec. 158 and cases cited.

The leading authority on this point seems to be the case of Mulry vs. Norton, 100 N. Y. 424.

Quoting from the opinion in that case:

"It is said in Hargreave's Law Tracts (Matthew Hales De Jure Maris, 36-37). If a subject have land adjoining the sea and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject, does not lose his property, and accordingly it was held by Cooke & Foster, M. 7 Jac. C. B., *though the inundation continue for forty years.* But if it be freely left again by the reflex and recess of the sea, the owner may have his land as before, it he can make it out where and what it was; *for he cannot lose his propriety of the soil though it be for a time become part of the sea and within the admiral jurisdiction while it so continues.*"

In the case of Morris vs. Brooks, decided by the Court of Common Pleas of Delaware, to which reference is made in the case above cited of Mulry vs. Norton as being a case quite in point, Judge Wilson says:

> "The right to the new island and also to land gained by alluvion or reliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of the Little Tinnicum was destroyed by the force of the winds and the waves, and it was consequently overflowed by the waters of the river, yet the owner did not lose the property of the remaining land covered by the water. If it was regained, either by natural *or artificial means,* it continued to belong to the original proprietor. *He might embank it and thereby exclude the waters if circumstances permitted."*

So it was held in Wallace vs. Driver, 31 L. R. A. (Ark.) 319, that:

> "The reverse of what has been said of accretions and erosions is true of avulsions. Where a stream which forms the boundary line of lands from any cause suddenly abandons its old and seeks a new bed, or suddenly and perceptibly washes away its banks, such change of channel or banks, if its limits can be determined, works no change of boundary. *The owner still holds his title to the submerged land."*

Hunt on Boundaries, etc., page 29.

> "Therefore, if the sea rises gradually and imperceptibly the proprietors whose lands are submerged have no remedy against the crown, whose property will consequently extend as far as the new high-water mark; but if the encroachment of the water is sudden and violent no change of property takes place, and there-

fore, as well during the inundation as also afterwards, upon the recession of the water, every owner will retain and take again his land if its boundaries are distinguishable.

"It follows that if a public navigable river slowly and imperceptibly changes its course, the boundaries of the property adjoining the banks will gradually shift with the altered channel, but that if the change be sudden no alteration of the boundaries will take place."

So that the washing away by freshets of the surface of the soil of Brunot's Island instead of the Commissioners' line of 1865, which is admitted to be located upon what was the actual high-water mark at that time, has made no alteration in the boundary of the island. That boundary still remains where it was at that time, to wit, on the Commissioners' line of 1865.

This doctrine is fully recognized by the Supreme Court of the United States in the case of St. Louis vs. Rutz, 138 U. S. 226, where it says, on p. 245, citing Mulry vs. Norton:

"The sudden and perceptible loss of land on the premises conveyed to the plaintiff which was visible in its progress did not deprive Blumenthal as riparian proprietor of his fee in the submerged land, nor in any manner change the boundaries of the surveys on the river front as they existed in 1865, when the land commenced to be washed away.

"It is contended by the defendant not only that the plaintiff never had any title to the bed of the river, but that when the dry land of which he was in possession was swept away by the river and ceased to exist his ownership of that land also ceased to exist. It is laid down, however, by all the authorities that if the bed of the

stream changes imperceptibly by the gradual washing away of the banks the line of the land bordering upon it changes with it, *but that if the change is by reason of a freshet* and occurs suddenly the line remains as it was originally."

See also—

Nebraska vs. Iowa, 145 U. S. 519.
Widdecombe vs. Rosemiller *et al.*, 118 Fed. 295.

It may be conceded, at least for the sake of argument, that if the washing away of this soil inside of the Commissioners' line of 1865 by the flood had gone so far as to cause the land to be covered by navigable water—that is, water which could be used for the ordinary purposes of navigation, so that it appeared to be part of the river for the time being, so long as the owners of Brunot's Island chose to leave it in that condition, the Government of the United States, in the exercise of its constitutional right to regulate interstate commerce, would be entitled to treat it as navigable water, and apply to its navigation the rules applicable to other navigable waters, including the balance of the Ohio river.

But the exercise of this right on the part of the Government could not in any way affect the right of the owner of this land to reclaim it whenever he saw fit to do so, by building upon it or filling it up with earth again, so as to exclude the waters. For, as already seen, it was expressly held in the case of Mulry vs. Norton, *supra,* that the owner of the land might reclaim it, even although the inundation or the submergence had continued for a great period of years, and even although during that time the land was covered with navigable waters, and, for that reason, "in the Admiral jurisdiction while it so continues."

The learned Judge of the Supreme Court of the District of Columbia, in dealing with this question, says (Record, page 29):

> "If the owner of Brunot's Island had intended to preserve its land up to the boundary line, as established by the State Commission, must it not have done so before allowing the water to become so deep as to be actually capable of being used for navigation and before the extension of the Harbor Line, as provided by the said Acts of Congress?"

In using this language the learned Judge evidently recognized the fact that the owners of Brunot's Island had at least a right to repair the damage done to their land by the washing away of this soil of the upland by a flood or freshet, provided they did so before the washing away went to such an extent as to cause it to be covered by water so deep as to be actually capable of being used for navigation.

It is submitted that it would be very difficult to find any authority for the proposition that the undoubted rights of a riparian owner under such circumstances to repair the damages caused by the floods by filling up or building upon the submerged land is subject to any such limitation. That it is not subject to any such limitation must be manifest when it is remembered that a single flood such as frequently occurs in the Ohio River at this point, might wash away enough of the soil of the island to cover that part of the land with water deep enough for navigation *and do it in a single night;* in such a case it would be manifestly impossible for the owner of the island to meet the condition suggested in the Court's opinion.

II.

This proceeding is "not virtually a suit against the United States" but a suit to restrain the defendant, an executive officer of the Federal Government, from exceeding his authority to the impairment of the property rights of the claimant.

The Secretary of War, in establishing the Harbor Lines complained of, and in preventing the Complainant, the Philadelphia Company, from building its power house upon the land in controversy, claims to be acting by authority of the Act of Congress, approved September 19th, 1890, and by authority of the Act of Congress approved March 3d, 1899 (30 Stat. L. 1151), superseding the Act of 1890. Section 11, Act of 1899, provides that:

> "Where it is made manifest to the Secretary of War that the establishment of Harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established beyond which no piers, wharves, bulkheads, or other works shall be extended, and so forth. * * *
>
> "Section 12. That every person and every corporation that shall violate any of the provisions of Sections 9, 10 and 11 of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of said Section 14 shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding twenty-five hundred dollars, nor less than five hundred dollars, or by imprisonment (in the case of a natural person), not exceeding one year, or by both such punishments, in the discretion of the Court."

The land upon which the Complainant is seeking to construct this building being, as we have already endeavored to

show, its absolute property, although for the time being covered by water by reason of the action of the floods and freshets, which washed away the soil within the Commissioners' line of 1865, it is submitted that the action of the Secretary of War in undertaking to establish the Harbor line of 1895, as well as the Harbor line of 1907, across this land, and in preventing by threats of criminal prosecution the Complainant from building thereon, is not authorized by this Act of Congress, is in excess of his authority and without any warrant of law whatever. The authority contained in this Act to the Secretary of War to establish Harbor lines cannot be intended to authorize him to establish them in this way, so as to prevent a man from building on his own land. Clearly this is a case not covered by the Statute.

According to the view taken by this Court in a number of cases, a proceeding to restrain the Secretary of War from such an arbitrary course is not regarded as virtually a suit against the United States. On the contrary, proceedings of this kind have frequently been sustained.

U. S. vs. Lee, 106 U. S. 218, 219, etc.

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to mandamus if he refused to do an act which the law plainly required him to do."
>
> Noble vs. Union River Logging Railroad, 147 U. S. 171-2, and cases cited therein.

A case very similar in its essential facts to the case at bar is that of

School of Magnetic Healing vs. McAnnulty, 187 U. S., pages 108-9-10.

In that case a bill was filed by the School of Magnetic Healing to restrain the enforcement by the Postmaster-General of an order excluding from the mails letters addressed to the Complainants. In defense the contention was made in that case, as in the case at bar, that the suit was virtually one against the United States. In overruling this defense, the Supreme Court said:

> "That the conduct of the Post-Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the Courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual, the Courts generally have jurisdiction to grant relief. * * * the decisions of the officers of the department upon questions of law do not conclude the Courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers. * * * Here it is contended that the Postmaster-General has, in a case not covered by the Acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * * Being a question of law simply, and the case stated in the bill being outside the statutes, the result is that the Postmaster-General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. * * * The facts, which are here admitted of record, show that the case is not one which by any construction of those

> facts is covered or provided for by the statutes under which the Postmaster-General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the Courts, therefore, must have power in a proper proceeding to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld. * * * In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from the complainants being the only remedy at all adequate to the full relief to which the complainants are entitled."

So in the case at bar it is respectfully submitted that the Secretary of War has "in a case not covered by the Acts of Congress," upon which he relies, in undertaking to prevent the complainant from building upon *his own land*, and that being a question of law simply, and the case stated in the bill being outside the statutes, the Secretary of War has established harbor lines in a place not authorized by the statutes, and has undertaken to forbid the complainant from building on lands which the Secretary of War had no right to forbid him to build upon, and that "the facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Secretary of War has assumed to act, and his determination that those admitted facts do authorize his action is "a clear mistake of law as applied to the admitted facts," and the Courts, therefore, must have power in a proper proceeding to grant relief.

In Scott vs. Donald, 165 U. S., page 112, Mr. Justice Shiras makes the following statement:

> "The bill prays for an injunction on the several grounds of irreparable damage; that the acts complained of prevent the exercise by the complainant of his right to import without molestation lawful commodities, the products of other States; to avoid multiplicity of suits, and the want of adequate remedies at law.
>
> "The objections to proceedings against State officers by injunction are that it is, in effect, proceeding against the State itself, and that it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this Court: (Osborn vs. The United States Bank, 9 Wheat, 738; Dodge vs. Woolsey, 18 How. 331; Board of Liquidation vs. McComb, 92 U. S. 531; Cummings vs. National Bank, 101 U. S. 153; Memphis and Little Rock Railroad vs. Railroad Commissioners, 112 U. S. 609; Virginia Coupon Cases, 114 U. S. 269, 295, 315; Pennoyer vs. McConnaughy, 140 U. S. 1; Belknap vs. Schild, 161 U. S. 10, 18.)"

Mr. Justice Shiras further on in his opinion, page 113, quotes as follows from *In Re* Tyler, 149 U. S. 164:

> "The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a State and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property on their hands unlawfully taken by them in behalf of the State, or for compensation for damages, or in a proper case, for an injunction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the State."

Mr. Chief Justice Marshall, in the case above cited of Osborn vs. The Bank of the United States, 9 Wheat. 842, in delivering the opinion of the Court, said in part:

> "If the State of Ohio could have been made a party defendant it can scarcely be denied that this would be a strong case for an injunction, the objection is, that, as the real party cannot be brought before the Court, a suit cannot be sustained against the agents of that party; and causes have been cited to show that a Court of Chancery will not make a decree unless all those who are substantially interested be made parties to the suit.
>
> "This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the law could not afford the same remedies against the agent employed in doing the wrong which they would afford against him, could his principal be joined in the suit. It is admitted that the provilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing?"

In New Orleans vs. Paine, 147 U. S. 264, Mr. Justice Brown said:

> "In Noble vs. R. R. Co., we had occasion to examine the question as to when a Court was authorized to interfere by injunction with the action of a head of a department, and came to the conclusion that it was only where, in any view of the facts that could be taken such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power. In that case it appeared that the only remedy of the plaintiff was to enjoin the Secretary of the Interior from revoking his approval of a certain map which operated as a grant of land. His contemplated action amounted, in effect, to the cancellation of a land patent."

In Louisiana State Lottery Co. vs. Fitzpatrick, 15 Fed. Cas., page 986, the Court said:

> "Nor is there anything in the fact that a defendant is an officer and supposes he is performing an official duty, which would constitute a reason for withholding the exercise of this jurisdiction. The jurisdiction is conservatory, and is employed where a wrong is attempted *under color of law* and with an appearance of right to inflict permanent and incurable mischief."

III.

A Court of Equity will entertain a bill to restrain the institution and prosecution of criminal proceedings, as threatened in this case, for the reason that such prosecution would interfere with, and, in effect, destroy the property rights of the complainant in the land in question. Because in fact the prosecution of such proceedings would entirely deprive plaintiff of the use of its property and constitute such a taking of private property for public uses as a Court of Equity will always enjoin.

It is stated that the general rule is that a Court of Equity will not undertake to restrain a criminal prosecution, but there is an exception to this rule, which is quite as well established and possibly quite as broad as the rule itself, and that is, that where the effect of the prosecution of such criminal proceedings will be to interfere with or destroy *property rights* a Court of Equity will enjoin the same.

Davis & Farnum Mfg. Co. vs. Los Angeles, 189 U. S. 207, and cases therein cited.

In Central Trust Co. vs. Citizens' Street Railway Co., 80 Fed. 225, where prosecution was threatened under an unconstitutional three-cent fare law, the Court said:

> "Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the District Attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that, when such prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chan-

cery is available. Reagan vs. Trust Company, 154 U. S. 362, and Lottery Company vs. Fitzpatrick, Fed. Cas. No. 8541, in each of which apprehended criminal prosecutions were enjoined, are to the point. Even in the case of Sawyer, 124 U. S. 200, cited by the Attorney General, the rule as here stated is plainly recognized, nor do I find it disputed in any case. * * * But counsel for the defendants insist that at all events a preliminary injunction ought not to issue. They say if the defendant Railroad Company will obey the law and reduce its fares to three cents, the damage prior to final hearing will be inconsiderable or nothing; but suppose the alleged law to be invalid, and suppose the defendant Railroad Company declines to obey it. In the Reagan Case, above cited, the same argument could have been used, yet there the preliminary injunction was issued. So also in Lottery Co. vs. Fitzpatrick, wherein is discussed at length the question whether or not the preliminary injunction should issue. How can the point as to the validity of the amendment of 1897 be presented on any subsequent hearing more distinctly than on this? My opinion is that where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue."

In Louisiana State Lottery Co. vs. Fitzpatrick, 15 Fed. Cases, page 986, above cited, the Court uses the following language:

"The power of a Court of Chancery to restrain persons subject to the jurisdiction of the Court and parties to a cause pending before it from taking proceedings in other Courts, *whether domestic or foreign*, to defeat the ends of such proceedings is indisputable. The power rests upon the fact that every Court has an authority to

defend its jurisdiction, and to restrain persons subject to this authority from acts calculated to defeat it. * * * In a case which, as does this, involves the right of property, in which an invasion of those rights is sought to be effected through processes based upon a law of a State void because unconstitutional, it makes no difference whether the void law is found in a criminal or civil code, or whether the process which is sought to be made the instrument of the injury bears the seal of a police magistrate or the signature of a St[illegible] auditor. Both are void, because resting upon a prohibited and void law of a State. Those who issue and use them may be sued at law for damages, and in proper cases of equitable jurisdiction *those who threaten to use them may be restrained by injunction.*"

In Dobbins vs. Los Angeles, 195 U. S. 241, where an ordinance was passed restricting the district in which gas works could be built. Later, after a permit had been granted for some works within the district, another ordinance was passed restricting from such use the land upon which the works were being built. The Court said:

"It is also urged by the defendants in error that a Court of Equity will not enjoin the prosecution of a criminal case, but, as we have seen, the plaintiff in error in this case had acquired property rights which, by the enforcement of the ordinances in question, would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the *work without interference by the City authorities in the form of arrest and prosecution of those in her employ.*

The proposition established in the cases of City of Hutchinson vs. Beckham, 118 Fed. 401-402, and in Greenwich Ins. Co. vs. Carroll, 125 Fed. 126, that the fact that the question

as to whether the executive officer was acting within his authority or *not could be decided upon the trial of the criminal case, did not constitute such an adequate remedy at law so as to exclude a Court of Equity from assuming jurisdiction.*

In the former case an ordinance provided for a license tax on the retail grocery business as conducted under certain conditions in Kansas City and for fines and imprisonment for non-compliance with the statute. The Court said in part:

> "One paragraph of the bill, as heretofore shown, alleged that the City authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to make further like arrests and to institute numerous criminal prosecutions and thereby prevent them from receiving, storing and making speedy deliveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the City, yet as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might and probably would have been compelled to defend a multitude of suits and submit to daily interruptions of their business, which would have proven to be very annoying and probably disastrous. * * * When in addition to the fact that an illegal tax has been imposed, it further appears that the persons or corporations upon whom it is imposed will be called upon to defend a multitude of suits, or that they will sustain great injury if the State or municipality is left free to enforce the tax by the usual remedies, Courts of Equity never hesitate to assume jurisdiction and grant injunctions against those who are seeking to enforce the collection of the tax if it appears to be clearly illegal."

In the latter case on a very similar state of facts it was held:

"But it is argued that there is a remedy at law. A Court of Equity has the power, and it is likewise its duty to enjoin the enforcement of an unconstitutional statute, when such enforcement would subject the party to innumerable prosecutions, and particularly when such prosecutions would, pending litigation, work great hardships and wrongs and damages.

"The recent decision of the Circuit Court of Appeals for this circuit in the case of City of Hutchinson vs. Beckham, 118 Fed. 399, is an authority, and of binding force upon this Court. It puts at rest the question as to the jurisdictional amount involved. It also puts at rest the duty and power of a Court of Equity to enjoin the enforcement of an invalid law when prosecutions would be followed with loss of business, expense and hardships. And it also holds the fact that the party could resist the enforcement of such invalid law by a defense to proceedings in the State Court does not prevent a Court of Equity, State or Federal, from taking jurisdiction. A State statute can neither enlarge nor curtail the equity jurisdiction of this Court, and it will not do to say that because a law is unconstitutional and because all are conclusively presumed to know the law, there need be no fear that the officer who is commanded to act under the statute will attempt to enforce it."

Frewin vs. Lewis, 4 Mylne & Craig, 249.
Baltimore vs. Radeke, 48 Md. 217.

In the case of Georgia R. R. and Bkg. Co. vs. Atlanta, 118 Ga. 490-491, where the facts are somewhat similar to the case at bar, the Court said:

"The City insists, however, that the refusal to grant the injunction was proper, since equity will not inter-

fere with the enforcement of criminal laws, nor aid or obstruct criminal Courts in the exercise of their jurisdiction. *But that principle in no way deprives a Court of Equity of its power to protect private property,* nor ousts chancery of its jurisdiction over nuisances and trespasses, nor prevents the grant of injunctions against *threatened or existing wrongs,* nor defeats its power to enjoin a continuing injury to property or business. When equity acts in such instances *it ignores the criminal feature* and exercises jurisdiction solely with reference to the effect of the act on property or business. Were this a contest between two private individuals, both claiming title to the land, the one in possession could have proceeded to build, and would have been protected against violent or forcible obstruction by the other claimant, until after he had established his title. The parties here are not on equal terms. The company was in possession, and was notified by the City Engineer that if it attempted to build a fence he would resist by force and arms; the demurrer admits that the City would aid this officer by prosecuting the agents of the company who might from day to day obey lawful orders. *If the Company is deterred from exercising its power as owner by the threat of prosecution, it is as much deprived of its right as if the Chancellor had expressly restrained it from building the fence.* In practical effect, therefore, the refusal to grant the Railroad Company an injunction against the City is the equivalent of granting the City an injunction against the company."

That the action of the defendant and his agents in seeking to forcibly prevent the complainant from building upon its land constitutes an interference with, and practically a destruction of, the complainant's property rights within the meaning of the authorities above quoted would seem to be

clear, and it is submitted that, in effect, such action, if permitted to be persisted in, would constitute in law a taking of the complainant's property without compensation in violation of his rights under the Constitution of the United States, and especially under the Fifth Amendment thereof.

In the case of Georgia R. R. Company vs. Atlanta, 118 Ga. 490-491, already quoted under another head, the complainant filed a bill to restrain the City of Atlanta from interfering with the erection by the complainant of a fence upon what the complainant claimed to be its property, and the Court said:

> "If the property then consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property, and hence that his property may be taken in the constitutional sense though his title and possession remain undisturbed, and it may be laid down as a general proposition that whenever the lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed, by reason of the exercise of the power of eminent domain, his property is *pro tanto* taken and he is entitled to compensation."
>
> Lewis on Eminent Domain, Vol. 1, par. 56.

> "Property then in a determinate object is composed of certain constituent elements, to wit, the unrestricted rights of use, enjoyment and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property though the possession and power of disposal of the land remain undisturbed and though there be no actual or physical invasion of the *locus in quo.*"

"From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without *ipso facto* taking the owner's property. Right of indefinite user is an essential element of absolute property or complete ownership whatever physical interference annuls this right takes property—although the owner may still have left him valuable rights of a more limited and circumscribed nature. He has not the same property that he formerly had. Then he had an unlimited right; now he has only a limited right."

Eaton vs. B. C. & M. R. R. Co., 51 N. H. 511-512.

It should be observed that it is not complainant's contention in this case that the mere establishing of the harbor lines complained of, and the requiring of the plat in the office of the Secretary of War, unaccompanied by the taking of any active measures on the part of the defendant to actually interfere with the complainant in the use of its property, would have furnished sufficient ground for the interference of a Court of Equity, by a writ of injunction, because it has been held by the Supreme Court in the cases of,

Yesler vs. Washington Harbor Line Commissioners, 146 U. S. 646, 656, and

Prosser vs. N. P. Ry. Co., 152 U. S. 59,

that the mere establishing of harbor lines unaccompanied by any such action did not constitute such a cloud upon the complainant's title to his land or such invasion of his rights as would justify such relief.

But the facts of the case at bar are exactly the reverse of the facts of those cases in this respect.

In the Yesler Case, pages 655, 656, the Court says:

"Assuming our jurisdiction to revise the judgment of a State tribunal upholding a law authorizing the taking of private property without compensation, to be unques-

tionable, we cannot accede to the position that the action of the Harbor Line Commissioners, in locating the harbor line and filing the plat, would take any of the relator's property, or so injuriously affect it as to come within the constitutional inhibition. The filing of maps of definite location in the exercise of the power of eminent domain furnishes no analogy. The design of the State law is to prohibit the encroachment by private individuals and corporations on navigable waters, and to secure a uniform water front; *and it does not appear from relator's application that the defendants have threatened in any manner to disturb him in his possession, nor that that which is proposed to be done tends to produce that effect.* Whatever his rights, they remained the same as before, and the proceedings, as the Supreme Court said, could not operate to constitute a cloud upon them from the standpoint of relator himself, for if nothing further could lawfully be done in the absence of legislation for his protection that was apparent."

In the case at bar, it is admitted that the facts are just the reverse, and that the defendant has "threatened" and is "threatening" to disturb complainant in its "possession," and that what it proposes to do, to wit, prosecute it criminally in case it undertook to exercise its right of possession, will most assuredly "tend to produce that effect."

In the Prosser Case the Court says (page 65):

"The establishment of general harbor lines, of itself, takes or injures no one's property, and cannot, consistently with the interests of the public or with the principles of equity, be restrained by injunction. If the State of Washington or the City of Tacoma or any public officer or private individual shall hereafter *take*

active measures or bring suit, so as to injure or affect the supposed title or rights of the plaintiff, or its use and enjoyment thereof, the dismissal of this bill will not stand in the way of a full and fair trial of the title and rights claimed."

Now in the case at bar the defendant is certainly taking the most "active" kind of "measures" when it threatens to put the plaintiff's officials in jail if they proceed with their work of constructing their building on the company's property; so that while the mere establishment of the harbor line might be held not to constitute a cloud on the title, yet when taken in connection with the "threats" and "active measures" above mentioned, the case is clearly within the principle of the authorities above so fully referred to.

These cases may also be distinguished from the case at bar upon the further ground that the nature of the complainant's title in those cases was entirely different from that of the complainant at bar; they did not own the land over which the harbor lines were constructed, but merely claimed to have rights therein, and in the Yesler Case the Supreme Court of the State of Washington from whose decision the appeal was prosecuted to the Supreme Court of the United States, said that they were also of opinion that Yesler's title was not of a nature to be clouded, and even if it were, the proceedings complained of could constitute no cloud thereon.

Yesler vs. Prosser, 27 Pac. Rep. 550.

IV.

The fact that the land of the plaintiff of which the defendant is depriving the plaintiff the possession by threatening it with criminal prosecution if it uses said land—which in other words the defendant is attempting to take without compensation—is not located in the District of Columbia does not deprive the Supreme Court of the District of jurisdiction.

It is contended on behalf of the defendant in this case that this suit is of a local and not of a transitory nature, and for that reason must be instituted in the district where the land is located. This defense is based upon the theory that the suit is brought to determine the plaintiff's title to the land in question, that that is the main purpose of the suit. It is submitted that this theory is manifestly erroneous. The defendant, the Secretary of War, does not deny the plaintiff's ownership of the submerged land lying between the upland of Brunot's Island and the Commissioners' line of 1865.

On the contrary the defendant by its demurrer admits the ownership of that land by the plaintiff, but contends that because it has become covered by navigable water, and so long as it is covered by navigable water, he has a right to prevent the plaintiff from building upon it by virtue of the Acts of Congress establishing harbor lines. The question as to whether or not the said Acts of Congress do confer such power upon the defendant is not a question of State law but a question of Federal law.

It may be that when the answer of the defendant comes in he will deny the plaintiff's title to this property. But he has not denied it yet. That title does not appear to be in controversy, and the establishment of that title was certainly not the object of this suit.

But even though the defendant should deny the plaintiff's title to the land in question in his answer the jurisdiction of the Court would not be ousted.

The mere fact that the title to land is or may be involved in the case does not necessarily have the effect of ousting the jurisdiction of the Court where the defendant resides but in which the land is not located.

Stone vs. U. S., 167 U. S. 169, etc.

In this case it was said:

> "In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and railroad ties manufactured out of such trees; and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands, and the averment of ownership in the United States, were intended to show the right of the Government to claim the value of the personal property manufactured from the trees illegally taken from its lands. *Although the Government's denial of the ownership of the land made it necessary for it to prove its ownership, the action in its essential features related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process.*"

So in the case at bar the action in its "essential features" relates not to the title of the land, but to the *personal right* of the plaintiff to use the land in the way proposed, that is, by building on it, as against the right claimed by the defendant under the Acts of Congress authorizing the establishment of harbor lines to prevent the plaintiff from so using it and to have him put in jail if he does so use it. An action

of this kind is essentially of a "transitory nature." Assuming that the complainant has a right to the main relief which he asks in this case, that is, an injunction against the defendant on the ground that he is exceeding the authority conferred upon him by the Act of Congress in question unless the Court of the District in which the defendant resides has jurisdiction, the plaintiff can have no redress. No decree *in personam* could be rendered against him by any other Court.

This is not a suit to protect the land itself or to enjoin the defendant from doing physical injury or damage to the land, or to enjoin him from trespassing in any way upon it, but is a suit in its essential nature to protect the personal right of the plaintiff, namely, the right to build a house on his own property, and by prohibiting the defendant, who resides in this District, through his agents, from interfering with that right of the plaintiff.

The proposition here contended for seems to be fully established by the decision of this Court in

Cole vs. Cunningham, 133 U. S. 107.

In that case the Court said, quoting from Phelps vs. McDonald, 99 U. S. 298:

> "Where the necessary parties are before a Court of Equity it is immaterial that the *res* of the controversy whether it be real or personal property is beyond the territorial jurisdiction of the tribunal, it has the power to compel the defendant to do all things necessary according to the *lex loci rei sitae* which he could do voluntarily to give full effect to the decree against him.
>
> "Without regard to the situation of the subject matter, such Courts consider the equities between the parties and decree *in personam* according to those equities and enforce obedience to their decrees by process *in personam.*"

And again in the same opinion it is said:

> "In Lord Port Arlington vs. Soulby, 3 Milne & K. 104, 106, *Lord Brougham* reviews the history of jurisdiction to restrain parties from commencing or prosecuting actions in foreign countries and concludes: Nothing can be more unfounded than the doubt of the jurisdiction. That is ground like all other jurisdictions of the Court, not upon any protection to the exercise of judicial and administrative rights abroad, but on the circumstances of the person of the party on whom this order is made being within the power of the Court."

As a matter of fact, the Supreme Court of the District acted in accordance with this very doctrine in assuming jurisdiction by the suit of the Buck Stove and Range Company of a suit to enjoin Gomper and others, who were residents of the District of Columbia, from doing damage to the plaintiff's business and property situated in a distant State.

Respectfully submitted,

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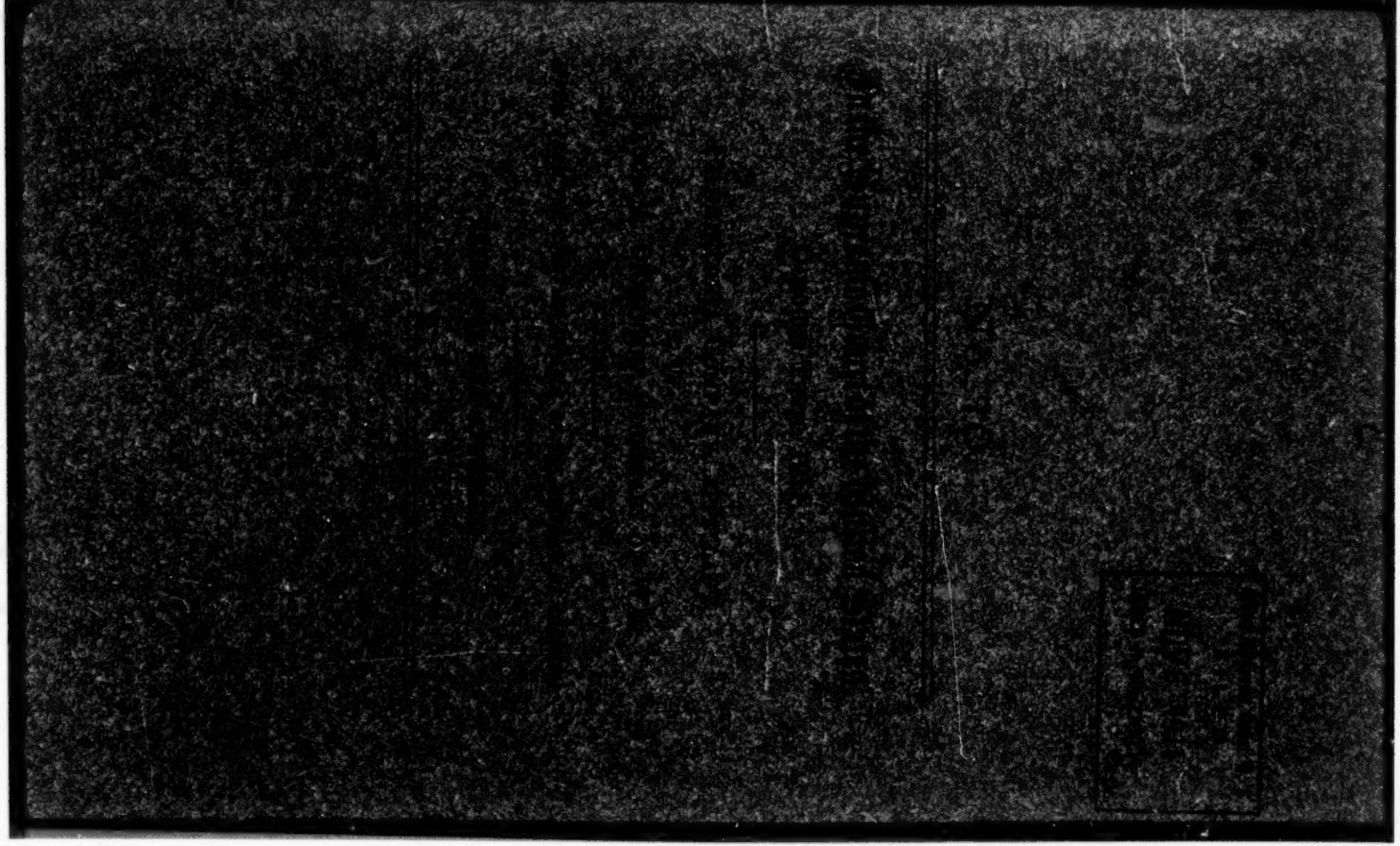
For Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1911.

PHILADELPHIA COMPANY, APPELLANT, *vs.* JACOB M. DICKINSON, SECRETARY OF WAR.	No. 70.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE.

The appellant, a Pennsylvania corporation, brought this suit in the Supreme Court for the District of Columbia for the purpose of annulling in part certain harbor lines, defining Pittsburgh Harbor, which were established by the Secretary of War under authority of acts of Congress hereinafter mentioned, and to enjoin the Secretary perpetually from any attempt to cause criminal proceedings to be instituted against the appellant based upon that legislation. The demurrer of the defendant, specifically upon jurisdictional grounds,

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was sustained by the Supreme Court and the Court of Appeals. The facts stated in the bill may be summarized as follows:

The plaintiff is the owner of an island, known as Brunot's Island, situate in the Ohio River below Pittsburgh and within the corporate limits of the city of Allegheny. Between the island and the south bank of the stream flows a navigable channel known as the Back Channel of the river. Both channel and island are within the limits of Pittsburgh Harbor as defined by appropriate action of the United States Government. April 16, 1858, the Legislature of Pennsylvania enacted a law entitled "An Act To establish High and Low Water Lines in the Allegheny, Monongahela and Ohio rivers, in the vicinity of Pittsburg, in Allegheny county." (Laws of Pennsylvania, 1858, No. 363, p. 326.) The full text of the statute is set out in an appendix to this brief. It begins with a preamble reciting the facts that the lines of lands along the shores of the rivers at and near Pittsburgh have never yet been clearly ascertained, and that it is important to the owners of such lands, the persons navigating the rivers and the adjacent [municipal] corporations and to all parties interested, that they should "know and have their several rights and privileges in extension and limitation ascertained and defined," and then proceeds to provide for the appointment of commissioners to lay out lines of high and low water along the shores, and for subsequent proceed-

ings in the State district court designed to correct all mistakes and establish the lines after full hearing, declaring in this connection that "the lines so approved shall forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid." Section 2 of this statute, which precedes the words last quoted, indicates plainly that the main purpose was to protect navigation and the rights of the public to the use of the rivers from undue obstructions by riparian owners. Pursuant to this enactment proceedings were had which resulted, in 1865, in the establishment of high and low water lines within the limits therein specified. These lines skirted the shore of Brunot's Island on the Back Channel, as indicated on plaintiff's Exhibit "B" (R., 10), where they are designated as "Commissioners'" lines. They corresponded, when established, with the ordinary lines of high and low water as then existent. In the course of time, however, intrusions of water of the Back Channel occurred which resulted in the overflowing and submerging of a considerable portion of the island, so that actual high and low water lines were shifted inward upon the island. The bill does not state when this process began or when it ended. The allegation concerning it is as follows (R., 4):

> Further complaining your Orator shows unto your Honors that subsequent to the establishment in 1865 by said Commissioners of the line of high-water mark, as aforesaid, a considerable amount of the soil of the shore

> of said Brunot's Island on the so-called back channel, within the said high-water mark was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is the land above high-water mark, became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind, thereover.

The bill further alleges (R. 5):

> Some years ago the United States Government, in the interest of navigation and in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below said Brunot's Island known as the Davis Island Dam. The effect of this dam was to very decidedly increase the depth of the water in the channel back of Brunot's Island, and to cause the water of the river to flow higher upon the land of your Orator, and to submerge same to a far greater extent and in fact to make said water which submerged your Orator's land navigable at certain times, and for certain purposes, which water was not navigable before the construction of said dam.

The bill does not indicate otherwise how much of the present submergence is due to the Government dam and how much to natural causes, and, so far as the former is concerned, it does not appear that it was ever objected to, or that compensation was not

made to the then owner of the island, if compensation was due.

The river and harbor appropriation act approved September 19, 1890 (26 Stat., 455, ch. 907, sec. 12, amending the same section of the similar act of August 11, 1888, 25 Stat., 425), provided:

> Where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense.

Under this authority harbor lines were surveyed in Pittsburgh Harbor on both sides of the Ohio River as far down as Davis Island Dam, and approved by Secretary of War Lamont January 25, 1895. The lines as thus approved along Brunot's Island in the Back Channel lay, for the most part, between the high and low water "commissioners" lines; see plat Exhibit "B." (R. 10.) As appears by certified documents from the War Department

attached to the bill (R. 11–18), the harbor lines of 1895 were adopted only after elaborate surveys and calculations and many public hearings, and their establishment was compelled by the serious encroachments upon the river-channel made by riparian owners (R. 13). The bill does not show that objections to this line were made by the plaintiff's predecessor in title (R. 24), the then owner of Brunot's Island.

In the river and harbor act of March 3, 1899 (30 Stat., 1151 et seq., ch. 425), elaborate provisions were made for the protection from obstructions of harbors and other navigable waters, and authority was conferred upon the Secretary of War to that end. Sections 9 to 12 inclusive, and 17, of that act are printed in the appendix. Section 10 prohibits the creation of any obstruction not affirmatively authorized by Congress to the " navigable capacity " of any waters of the United States and the building of any wharf, pier, etc., or other structure in any harbor or navigable river, outside established harbor lines, or where no harbor lines have been established except on plans recommended by the Chief of Engineers and authorized by the Secretary of War. It also prohibits any alteration or modification of the course, location, condition, or capacity of any harbor, etc., or of the channel of any navigable water of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War before the commencement thereof. Section 11 (still

in force) repeats the language of section 12 of the act of 1890, *supra*, omitting the penal provisions and inserting a proviso not material for special consideration here. Section 12 provides that any violation of sections 9, 10 and 11, or of any rule or regulation of the Secretary made in pursuance of section 11 (so corrected from " fourteen " by act of February 20, 1890, ch. 23, 31 Stat., 32), shall be deemed a misdemeanor subject to punishment by a fine or imprisonment or both, in the discretion of the court, and that the removal of structures erected in violation of those sections may be enforced by injunction of the Circuit Court in proceedings to be taken by the Attorney General.

In August, 1904, the Pittsburgh Coal Exchange, in a letter to an engineer officer stationed at Pittsburgh, called attention to the exceedingly bad conditions for navigation in the harbor due to excessive encroachments upon the river and, to the end that matters might not be made worse, requested that the harbor line established in 1895 along the back channel of Brunot's Island be moved back toward the island. (R., 19.) Steps and proceedings were thereupon taken which resulted in a recommendation by the Chief of Engineers to the Secretary of War that the harbor line be modified. The letter from the former to the latter, conveying the recommendation, set forth, among other things, that while the lines of 1895 quite closely followed actual high-water banks in the harbor, this was not true in the channel back of Brunot's Island, the line there at

certain places being from 150 to 300 feet riverward of the pool line of the Davis Island pool; that advantage had not been taken by all riparian proprietors of their privilege to build out to the old line, and experience had shown the need of retaining as far as possible the natural width of the river between its high-water banks to avoid aggravation of conditions already disadvantageous to navigation; that at the point of proposed modification the river bed was in essentially the same condition as in 1895, and that any material contraction of the channel there would result in injury and produce conditions detrimental to navigation and the harbor. This communication also shows that the only objector was the appellant in this case, which appeared at a public hearing where the whole subject was thoroughly gone over. (R., 17.) The change in the harbor line was approved by the Secretary February 23, 1907. (R., 22.) The position of the line as changed on Brunot's Island is given on the plat, Exhibit "B." (R., 10.)

The bill does not deny—in fact the documentary exhibits which are a part of it affirmatively show—that the appellant had sufficient notice and was given a full hearing by the Secretary of War before the change was made. (*Union Bridge Company* v. *United States*, 204 U. S., 364.) The appellant alleges (R., 6) that recently it was upon the point of establishing a coal wharf on the back channel side of the island where both the harbor line of 1895 and that of 1907 run some distance landward

of the State commissioners' high-water line, but that while engaged in perfecting its plans it was notified through the engineer officer at Pittsburgh that it had no right to build there. It charges that the defendant, through his " said agent and representative " (that is, the engineer), refused to allow the construction of the wharf outside of the harbor line of 1907, and threatened criminal proceedings under the acts of 1890 and 1899, *supra*, if such work were attempted. It claims that the establishment of the harbor lines constitutes an unlawful taking of its property for public use without compensation in violation of the Fifth Amendment; that it is subjected thereby to the possibility of a multiplicity of criminal prosecutions; and that the harbor lines are clouds upon its title to the area of submerged land affected, which is said to be in excess of 12 acres in extent and of a value of more than $5,000 per acre.

The prayer is that both the harbor line of 1895 and that of 1907, in so far as they encroach upon the plaintiff's land within the high-water mark established by the State commissioners, be declared null and void; that the action of the respective Secretaries of War in establishing them be annulled and canceled, and that a perpetual injunction be awarded to restrain the defendant, his agents, and representatives, etc., from instituting or causing to be instituted any criminal proceedings against the plaintiff or its agents or servants

" because of its reclamation and occupation of said land or the buildings thereon," or " from otherwise interfering " with plaintiff's use and occupation of said land.

The demurrer (R., 25) challenged the jurisdiction of the court and the sufficiency of the bill in substance, setting up specifically that the proceeding constituted virtually a suit against the United States, and that the court was without jurisdiction to restrain prosecutions for violations of law, or to declare or define harbor lines or boundaries of land beyond the District of Columbia, or to pass any decree removing a cloud upon a title to realty in Pennsylvania.

The Supreme Court held (R., 29) that the harbor lines were lawfully established, and inclined to the opinion that, even if they were not, the case was not such as to authorize the court either to annul them or enjoin anticipated criminal proceedings. It regarded the intimation that injury may have resulted from the dam as wholly immaterial and as merely suggesting possible relief by Congress or the Court of Claims.

The Court of Appeals expressed the view (R., 39) that if in truth the lines were an invasion of plaintiff's property rights, the suit would not be one against the United States or to which it would be a necessary party (citing *Ex parte Young,* 209 U. S., 123, and other cases). It based its decision, however, upon the propositions that the vital question in the suit was a question of title to realty

which could only be tried in Pennsylvania, and that, assuming the title not to be in dispute, the suit as a suit to remove a cloud would be in effect a suit against the United States.

In our argument, it will be assumed that the new harbor line has taken the place of the old (*Farist Steel Co.* v. *Bridgeport*, 60 Conn., 278, 286), and that no point is to be made of the alleged effect of the Government dam.

ARGUMENT.

I.

THE HARBOR LINE WAS LAWFULLY ESTABLISHED.

As riparian owner with or without the fee of the river bed, the appellant is in no position to complain of the new harbor line. No "taking" of property is involved in the incidental losses which result to such an owner from the exercise by Congress of its paramount power to improve and protect navigation. The navigable waters "are the public property of the nation, and subject to all the requisite legislation by Congress." (*Gilman* v. *Philadelphia*, 3 Wall., 725.) Congress "may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage." (*South Carolina* v. *Georgia*, 93 U. S., 4, 11, 12.) "And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power." *Mobile* v. *Kimball*, 102 U. S., 691, 697.)

" Although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution," and " riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard." (*Gibson* v. *United States*, 166 U. S., 269, 272, 276.)

In the case last cited it was held that although the effect of a dike constructed in the Ohio River under authority of Congress was to destroy entirely the usefulness of a valuable landing and entail a large pecuniary loss to the riparian owner, there was no taking of property. The pier involved in *Scranton* v. *Wheeler* (179 U. S., 141) not only cut off permanently all access to navigability from plaintiff's land, but was also constructed on submerged land—part of the river bed—of which he held the fee, yet it was held to be *damnum absque injuria*. See, also, the learned opinion by Mr. Justice Lurton in *Scranton* v. *Wheeler* (57 Fed., 803) and *Hawkins Point Light-House case* (39 Fed., 77).

In this case reliance seems to be placed entirely upon some supposed immunity, right, or privilege, acquired from the State. But Congress by its legislation has assumed exclusive control over the whole subject of obstructions in navigable waters, and no obstruction, hereafter made, with or without the permission of the State, can be considered

lawful unless it have also the sanction of the National Government. (*United States* v. *Rio Grande Dam, etc., Co.*, 174 U. S., 690, 708; *Union Bridge Company* v. *United States*, 204 U. S., 364, 400, 401.) And, of course, it would be absurd to contend that a permission granted by the State years ago, but not acted on, could survive in the face of this sweeping policy of Congress. Realizing, no doubt, the force of this proposition, appellant, in the court below, endeavored to avoid its effects upon the theory that while the State may not grant a right or privilege to obstruct navigable water superior to the control of Congress, it may by its laws and proceedings accomplish indirectly what is, *pro tanto*, the same thing, viz., determine that a given area upon the shore shall never be deemed a part of the stream bed, even though, in course of time, it should become so in fact. The claim is made that the land between the shore and the old "commissioners'" line, though submerged by navigable water and in fact a part of the bed of the stream, is not so in legal contemplation, but, so far as legal incidents are concerned, is as though it had never become submerged, and remains part of the shore as it was in 1865. The old legal incidents, including the supposed immunity from Federal interference, are said to persist (1) through some prophylactic virtue in the State proceedings under the act of 1858, and (2) because independently of that act the shifting of the stream was such that under the law of the State the owner lost no land by it.

The dominant purpose of the act of 1858 appears to have been to protect navigation and the rights of the general public against obstructions of the river rather than to confer new privileges upon the riparian owners who were likely to cause the obstructions, for it is provided in section 2 that the lines to be established shall be laid out along the shores—

> In such manner *and position* as will most perfectly secure and perpetuate the navigable channels of said rivers, and best promote the safety and convenience of vessels, rafts, and persons navigating the same, and as will be most suitable in all respects *for the general benefit of the public at large.*

And by section 4 the lines when approved are to be " deemed, adjudged and taken firm and stable *for the purposes aforesaid.*"

Conceding, however, that one of the purposes was not only to fix riparian boundaries but also to guarantee them against possible encroachments by the river, it would still be gratuitous to read into the statute an attempt upon the part of the legislature to surrender the power inhering in the State to protect the river for the good of the public, much more a futile purpose of curtailing national power.

In the court below much significance was attached by appellant's counsel to their assertion that the change in the river came about through a process of avulsion rather than by gradual erosion. The essence of the legal distinction between these

processes is found in the fact that the operation of the one is sudden and its results perceptible in their progress, while the other operates so gradually that the eye does not observe the inward movement of the water. (*County of St. Clair* v. *Lovingston*, 23 Wall., 46, 47; *Jefferis* v. *East Omaha Land Co.*, 134 U. S., 178; *Nebraska* v. *Iowa*, 143 U. S., 359, 361.)

This bill, however, does not exhibit facts sufficient to show that the change in this instance was one of avulsion or submergence. Paragraph IV alleges (R., 4)—

> That subsequent to the establishment in 1865 by said commissioners of the line of high-water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's Island on the so-called back channel, within the said high-water mark was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is, the land above high-water mark, became and was overflowed and slightly submerged by water.

This is not an allegation that the change occurred perceptibly. (*Jefferis* case, *supra*, p. 191.) The rapidity with which floods and freshets wore away the bank, if they wore it at all, would depend upon a variety of physical conditions. They might wear rapidly, or gradually, or not at all; they might well add to instead of subtracting from the soil. The law is concerned only with the degree of speed with

which the diminution takes place, but as to this the bill is wholly silent.

But admitting that the change was by a process akin to avulsion, and conceding freely the power of the State to do away with the common law of accretion and erosion entirely, and establish a permanent boundary for the plaintiff's land, what has this to do with the matter of protecting navigation? Who shall say that the duty and power of Congress to protect the commerce, and therein to prevent injurious obstructions in the water, wane and wax with the natural shifting back and forth of the river courses, because the State has seen fit to legislate concerning boundaries? It sometimes happens that a large river will suddenly become displaced from one bed to make itself another for considerable distances where formerly the land was dry. In such an event must commerce cease upon it? Do those who sail its waters become trespassers against the owners of the new bed? Is the Government a trespasser when it undertakes to establish necessary protective works in the new situation? These questions are answered by their own absurdity. So if the course change widely but imperceptibly, leaving new land far within the old water line on one side and encroaching correspondingly upon the old land on the other, riparian owners may gain and lose, or not, according to the State law; but the power to protect navigation remains the same—only the theater for its necessary exercise is altered. So far as the General Government is

concerned, appellant is simply in the position of a riparian proprietor, owning the fee as far out as the commissioners' line, subject to have his use of it regulated in the interest of commerce under the authority of Congress.

II.

THE COURT WAS WITHOUT JURISDICTION.

1. Viewing the bill as seeking only such relief as equity accords for the peculiar protection of owners of real estate, we quite agree with the learned court below, that the appellant has entangled itself in a serious dilemma. If the questions involved primarily be those, both of fact and law, which respect, and the resolution of which must decide, the appellant's title under the laws of Pennsylvania, the suit as a suit to quiet title is local in character, and must fail for that reason, and perhaps others (*Boston, etc., Mining Co.* v. *Montana Ore Co.*, 188 U. S., 632, 639; *Dredging Co.* v. *Morton*, 28 App., D. C., 288), besides the reason that the suit could not possibly be other than a suit against the United States.

If, on the other hand, it be assumed, as appellant claims, that the bill but seeks to avoid the harbor line as a mere cloud, the invalidity of which can not be established without parol proofs, but can be so made to appear without injecting any question of title, the suit is equally a proceeding against the Government, because, unless the Government, and

not the defendant, be the claimant of the supposed adverse rights based upon or evidenced by the harbor line, and so the only real party in interest in this litigation, the line is without any legal significance at all.

Properly understood, however, a harbor line, even if erroneously laid out, is not to be regarded as a cloud upon the title to the land over which it extends. *Prosser* v. *Northern Pacific Railroad* (152 U. S., 59) appears to be determinative of this proposition as well as of the whole case. That was a suit brought by the Railroad Company in the Circuit Court for the District of Washington to enjoin individuals constituting the State Board of Harbor Line commissioners, from establishing harbor lines in the harbor of Tacoma over the plaintiff's wharves and lands, and to prevent the Secretary of State and the City Clerk from receiving or filing a plat of such lines made by the commissioners, covering land included in a strip 200 feet wide on either side of its railroad. The plaintiff claimed title to the land affected, as well as riparian rights, from the United States, as the plaintiff here claims title under the State; and wharves, warehouses, railway and other improvements had been constructed by it to the value of several millions of dollars. It set up that the action sought to be enjoined would, if permitted, deprive it of the use and benefit of all this property, without compensation or due process of law and put a

cloud upon its title. This court dismissed the bill and expressed itself as follows (p. 64):

> The more serious question, whether the grant of Congress to the Northern Pacific Railroad Company of the right to construct a railroad to the waters of Puget Sound can be construed as authorizing the corporation to lay out its railroad for two miles, below high-water mark, along the shore of a harbor, so as practically to monopolize the use of the waters of the harbor, and of the lands under them, can not properly be decided in this suit, and we express no opinion upon it.
>
> There can be no doubt that a State may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress, limiting the building of wharves and other structures upon lands not already built upon. (*Yesler* v. *Wash. Harbor Commissioners*, 146 U. S., 646; *Weber* v. *Harbor Commissioners*, 18 Wall., 57; *Atlee* v. *Packet Co.*, 21 Wall., 389, 393; *Commonwealth* v. *Alger*, 7 Cush., 53; *People* v. *New York & Staten Island Ferry*, 68 N. Y., 71; *State* v. *Sargent*, 45 Conn., 358.) Such harbor lines, in order to fulfill their purpose, must be established according to a general system, having in view not only the convenience of approach to the water from the shore, but the effect of the daily ebb and flow of the tide in keeping clear or filling up the harbor. The

> establishment of general harbor lines, of itself, takes or injures no one's property, and can not, consistently with the interests of the public, or with the principles of equity, be restrained by injunction. If the State of Washington, or the city of Tacoma, or any public officer or private individual, shall hereafter take active measures, or bring suit, so as to injure or affect the supposed title or rights of the plaintiff, or its use and enjoyment thereof, the dismissal of this bill will not stand in the way of a full and fair trial of the title and rights claimed.

See *Yesler* v. *Washington Harbor Line Commissioners* (146 U. S., 646) and s. c. *sub nom. Board of Harbor Line Commissioners* v. State (2 Wash., 530, 27 Pac., 550), where the constitutional and statutory provisions involved in the decision quoted are more fully set out and discussed.

The case then reduces down to an effort to prevent the Secretary of War from taking such steps as, in the exercise of his discretion, he may believe he ought to take under section 17 of the act of 1899, *supra*, if the appellant should proceed beyond the harbor line with its projected wharf, the true theory upon which the court is asked to exert such extraordinary interference being that appellant is in some unconstitutional sense deprived of the right to the full enjoyment of its property by reason of the danger of the anticipated criminal proceedings. Upon a perusal of section 17 it will be observed that the function confided to the Secretary—to re-

quest prosecution by the District Attorneys—is shared also by certain subordinate officers of his department and of the Treasury Department, and that while it thereupon becomes the duty of the District Attorneys to prosecute "all offenders," the discretion to determine in the first instance whether any offense has been committed is impliedly left with them, subject, of course, to the general supervising authority of the Attorney General. This case must therefore be considered as though the Attorney General, as well as the Secretary, were a party defendant, as, if the former would not be subject to be enjoined equally with the latter, the futility of the proceeding would be at once apparent.

In *Harkrader* v. *Wadley* (172 U. S., 148, 169) the court said:

> No case can be found where an injunction against a State officer has been upheld where it was conceded that such officer was proceeding under a valid State statute. * * * In proceeding by indictment to enforce a criminal statute the State can only act by officers or attorneys, and to enjoin the latter is to enjoin the State.

So it may truthfully be said, no case can be found in which the Attorney General, or any other executive officer of the General Government, has been restrained from the institution of criminal proceedings which, in the exercise of his judgment, he deemed it his duty to institute for the enforcement

of a valid act of Congress. If it may be done in this case, no reason is perceived why it may not be done in every case where it is possible to show that such proceedings are likely to follow some act by the plaintiff the performance of which would be to his pecuniary advantage but of doubtful legality. There may be many uses of property which would prove valuable to the owner and likewise harmful to the public. They may or they may not result in indictment and punishment, according to the degree in which they approach what is forbidden by the penal law. May the owner, upon proving a real danger of prosecution, always invoke equity upon the ground that the danger works irreparable damage to his property? In *Ex parte Young* (209 U. S., 203), relied on in the court below, and in all similar cases, the injunction was justified entirely upon the ground that the laws which were sought to be enforced were themselves unconstitutional and void, so that the officials who were restrained were in effect taking advantage of their positions to inflict grave, irreparable injury, for an unlawful purpose and in fact without any legal authority or justification whatsoever.

The situation anticipated by the appellant, is precisely analogous to that which was presented in *Fitts* v. *McGhee* (172 U. S., 516) as explained in the *Young case, supra,* page 156. In the *Fitts case* the unconstitutional act complained of was an act attempting to fix the maximum rates of toll to be charged on a certain bridge. The crimi-

nal prosecutions, on the other hand, were based upon a section of the Criminal Code of Alabama general in character, and providing punishment for the taking of any greater charge or toll for travel or passage over any road or bridge than was authorized by the charter of the company owning such road or bridge, or (in the absence of any specific authority in the charter) should be determined by the jury to be unreasonable. It was obvious, of course, that the unconstitutional act would be invoked and might play an important part in determining in the criminal prosecution what charges were permitted by the bridge company's charter or were reasonable within the meaning of the penal code. So, in the present case, the establishment of the harbor line may become involved in a criminal proceeding under the act of 1899; but just as in the *Fitts case* it was held that the constitutionality of the toll statute should be determined, along with all other questions of law, in the criminal prosecution, so in this case the question of the legality of the harbor line must be determined in the criminal prosecution, should the Government find reason to bring one; and in neither case might the prosecution be said to rest in any degree upon an unconstitutional statute.

The suit, therefore, is in effect a suit against the United States. (*Minnesota* v. *Hitchcock,* 185 U. S., 386; *Board* v. *McComb,* 92 U. S., 531; *Oregon* v. *Hitchcock,* 202 U. S., 60.) It is a palpable attempt to prejudge the merits of a criminal prosecution

which the Attorney General would have a perfect right, and, indeed, would be under a duty, to institute if, in his best judgment, he should conclude that the harbor line was lawfully established.

2. The case is also clearly not such a suit as ought to be entertained by the court as a court of equity. It is objectionable from this standpoint in the first place as a pure attempt to enjoin valid criminal proceedings. (*In re Sawyer,* 124 U. S., 200, 209, 210; *Harkrader* v. *Wadley,* 172 U. S., 148, 170; *Fitts* v. *McGhee, supra.*)

Furthermore, only one punishment would be involved under the act of 1899 by the construction of the wharf beyond the harbor line. In that respect also the case differs greatly from the *Young case.* There could be no multiplicity of prosecutions or cumulation of drastic penalties. Neither does it appear that great and irreparable loss will result from delaying the construction of the proposed wharf.

Finally, the harbor line produces no cloud upon the title and does not for any other reason afford a ground of equitable interference, as was fully determined by this court in *Prosser* v. *Northern Pacific Railroad Company, supra.*

Respectfully submitted.

ERNEST KNAEBEL,
Assistant Attorney General.

NOVEMBER, 1911.

APPENDIX.

AN ACT To establish High and Low Water Lines in the Allegheny, Monongahela and Ohio rivers, in the vicinity of Pittsburg, in Allegheny county.

Whereas, The lines of lands on and along the shores of the rivers at and near the city of Pittsburg, in the county of Allegheny, have never yet been clearly ascertained, and as it is important to the owners of such lands, the persons navigating the waters of, and the corporations adjacent to such rivers, and to all parties interested, to know and have their several rights and privileges in extension and limitation ascertained and defined: therefore,

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the district court of the county of Allegheny be and it is hereby authorized and required, at any time before the first day of June next, to order and appoint three discreet and disinterested freeholders as commissioners, none of whom shall reside on, or be the owners of any lands abutting on the said rivers within the county aforesaid, who shall take and subscribe an oath or affirmation before some competent authority, well and faithfully to perform the duties required by this act, to the best of their ability, without favor or partiality;

and in case of the death, resignation, or inability to act of any of the commissioners appointed as aforesaid, before the intended purposes of this act shall have been fulfilled, it shall be lawful for the said court to appoint another, or other persons to supply such vacancy or vacancies, who being qualified as aforesaid, shall proceed and act as if appointed in the first instance.

SECTION 2. That the commissioners appointed and qualified aforesaid, after giving due public and timely notice of their time and place of meeting, for at least ten days, shall proceed, taking to their assistance an able and competent surveyor, and examine the shores, surveying and marking thereon lines of ordinary low water, and lines of ordinary high water along the rivers Monongahela, Allegheny and Ohio, within the following limits, namely: From a line crossing Allegheny river at the north-eastern line of the borough of Sharpsburg; from a line crossing the Monongahela river opposite the mouth of the Four Mile run; and from a line crossing the Ohio river opposite the mouth of Wood's run, and around the shores of all the islands in the rivers aforesaid, and within the limits aforesaid, excepting such parts of said shores where said lines have been already established by law; such lines of low and high water to be laid out along said shores aforesaid, in such manner and position as will most perfectly secure and perpetuate the navigable channels of said rivers, and best promote the safety and convenience of vessels, rafts, and persons navigating the same, and as will be most suitable in all respects for the general benefit of the public at large.

SECTION 3. That the said commissioners may hear parties interested, and examine under oath, administered by one of their number, experienced hydraulic civil engineers, scientific men, and other persons, if they shall deem it necessary to enable them to obtain more accurate information in regard to flowing water in navigable streams, and in regard to the location of the lines aforesaid.

SECTION 4. That the said commissioners, when they shall have completed their surveys, and shall have determined the limits and located the said lines of low and high water mark, shall cause to be made a correct map or plan of the same with such descriptions and explanations as may be necessary to a perfect understanding thereof, and shall return the same authenticated by their respective signatures and that of the surveyor to the district court aforesaid; and it shall be the duty of the prothonotary of said court to receive and file said map or plan in his office, for public inspection and examination; and to give notice in at least three daily newspapers published in the city of Pittsburg, that on a day certain, to be appointed by the court, the said court will hear any objections which may be made thereto by any persons or parties who may consider themselves aggrieved by the adoption of the same; and the said court, after hearing the objections, shall adjudge and determine whether the same shall be fully established or be returned to the commissioners, either in whole or in part, for their re-examination; and if so returned the said commissioners shall proceed to re-consider the same, and thereafter shall return to the said court in the manner aforesaid, said maps, with such alterations and amendments, if any, as they shall deem necessary

and proper. The said court, after such determination, shall direct said map or plan, either with or without such alterations as shall have been made, to be recorded, and thenceforth the said map or plan so recorded, shall be taken and allowed for the purposes herein mentioned and contained, and the lines so approved shall forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid.

SECTION 5. That all riparian right now vested in the state, lying between high water lines and the rivers, within the district aforesaid, shall from thenceforth thereafter be vested in the several corporations within whose limits the same now is or hereafter shall lie.

SECTION 6. That the commissioners who may be appointed under this act, shall each be entitled to receive five dollars per day for their services, and the expenses incurred in carrying into effect the provisions of this act, shall be paid out of the treasury of said Allegheny county.

SECTION 7. That all or any acts of assembly that conflict herewith, either in whole or part, be and the same are hereby repealed.

Approved April 16, 1858.

Laws of Pennsylvania of 1858, No. 363.

SECTIONS FROM RIVER AND HARBOR ACT OF MARCH 3, 1899.

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navi-

gable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans, either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, con-

dition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

SEC. 11. That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided,* That whenever the Secretary of War grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basin for as much tidewater as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

SEC. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule

or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen [amended to " eleven "—act of February 20, 1890, ch. 23, 31 Stat., 32] shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

SEC. 17. That the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States

in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under the provisions of this Act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

30 Stat., 1151–1153, ch. 425.

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PHILADELPHIA COMPANY *v.* STIMSON, SECRETARY OF WAR.[1]

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 70. Argued November 16, 1911.—Decided March 4, 1912.

Exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.

In case of injury threatened by illegal action, an officer of the United States cannot claim immunity from injunctive process.

Where complainant does not ask the court to interfere with an officer

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[1] This case was originally commenced against William H. Taft as Secretary of War; by subsequent orders of the court the successive incumbents of that office, Luke E. Wright, Jacob M. Dickinson and Henry L. Stimson, were substituted as defendants and appellees.

of the United States acting within his official discretion, but challenges his authority to do the act complained of, the suit is not against the United States.

While the general rule is that equity has no jurisdiction over the prosecution of crimes, it may, when it is essential to the protection of property rights, as to which the protection of a court of equity has already been invoked, enjoin the institution of criminal actions involving the same legal questions.

An officer transcending the limits of his authority under a constitutional statute may inflict similar injuries on property or individuals as though he were proceeding under an unconstitutional statute, and in either event, equity may intervene to restrain unfounded prosecutions.

A court of equity having control of the person of defendant has jurisdiction of an action to restrain him from violating the rights of the complainant in regard to property not within its jurisdiction and may compel obedience to its decree. *Phelps* v. *McDonald*, 99 U. S. 298.

While the establishment of a general system of harbor lines for the protection of navigation is not of itself an injury to property and cannot be restrained, equity may enjoin an officer from taking measures to maintain the limits against an individual proprietor and so prevent him from enjoying what he asserts to be a lawful use of his own property.

A riparian proprietor of land bounded by a stream continues to hold to the stream as a boundary where the banks are changed by accretion or erosion, but if the banks are changed by avulsion, the title is not changed but remains at the former line. This rule applies alike to all streams and rivers no matter how strong and swift they may be.

To bring a sudden change of channel within the rule that it will not affect the boundary line, it must be perceptible when it takes place. *Nebraska* v. *Iowa*, 143 U. S. 359.

In this case, *held*, that the changes in the line of complainant's property were due to gradual erosion and not to sudden change of channel, and that the stream remained the boundary line.

The title to the soil under navigable waters within their territorial limits, and the extent of riparian rights, are governed by the law of the several States subject to the paramount authority of Congress; and under the authority of Congress, the Secretary of War may fix harbor lines superseding those fixed by the State.

Commerce includes navigation; *Gilman* v. *Philadelphia*, 3 Wall. 713;

and the power of Congress over navigation has no limits except those prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196.

The authority of Congress is not limited to water as it flowed at any preceding time. Alterations in the course of a stream do not affect the power of Congress.

The public right of navigation follows the course of the stream.

It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction to navigation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421.

Authority given by Congress to the Secretary of War to establish harbor lines is not exhausted in laying the lines once; the Secretary may change them at subsequent times in order to protect navigation from obstruction.

33 App. D. C. 338, affirmed.

THE facts, which involve the construction and constitutionality of acts of Congress giving the Secretary of War power to establish harbor lines in navigable waters of the United States, and the validity and effect of the action of the Secretary of War thereunder in regard to harbor lines established by him in the harbor of Pittsburgh, Pennsylvania, are stated in the opinion.

Mr. William L. Marbury, with whom *Mr. Morgan H. Beach*, *Mr. W. Graham Bowdoin* and *Mr. Samuel McClay* were on the brief, for appellant:

It was manifestly in the interest of navigation, as well as for the protection of riparian owners, that the legislature of Pennsylvania enacted Chapter 363 of the Acts of 1858, to establish high and low water lines in the Allegheny, Monongahela and Ohio rivers, in the vicinity of Pittsburgh, in Allegheny County.

The effect of this act and of the proceedings so taken thereunder was to secure to the owners of land along these rivers complete protection against any loss of their land or right to build upon the same because of any subsequent encroachment of the waters. *Bridge Co.* v. *Pfeil*, 42 Pitts. Leg. Jour. 18.

Rights of riparian owners on navigable waters, including the question of how far, if at all, their title to land shall be deemed to be affected by the action of the water, are determined and governed by the laws of the respective States. *Shively* v. *Bowlby*, 152 U. S. 1; *Barney* v. *Keokuk*, 94 U. S. 324; *St. Louis* v. *Meyers*, 113 U. S. 566; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349; *Packer* v. *Bird*, 137 U. S. 661.

In Pennsylvania the soil up to low-water mark in a navigable stream is the property of the Commonwealth. *Monongahela Bridge Co.* v. *Kirk*, 46 Pa. St. 112, 120.

Even if the overflowing of the complainant's property caused by the construction by the Government in improving the harbor might be *damnum absque injuria*, the owner of the property has the right to protect himself against such injury, if he can, at his own expense, either by excluding or expelling the water. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336.

But, even though the Pennsylvania act of 1858 had never been passed, upon the facts appearing in this case the title of the plaintiff as the owner of Brunot's Island to the submerged land lying inside islandward of the commissioners' line of 1865 remains absolute.

If the waters of the river had encroached gradually and by imperceptible degrees upon the island, as it existed in 1865, so that the land now in dispute gradually became part of the bed of the river covered with navigable water, in the absence of any such statute as the act of 1858 above quoted, the owner of Brunot's Island would have lost title to the land thus submerged and the same would have become the property of the State or of the municipality.

But, when as here, instead of the submergence or loss of land being caused by the gradual and imperceptible encroachment of the water, it is caused by sudden floods and freshets, the title of the owner of the island is not affected and he may at any time exclude the water or occupy

the land itself submerged in any way he pleases. *Rex* v. *Lord Yarborough*, 3 Barn. & C. 15; Angell, Tidewaters, 1st ed., 71; *Emans* v. *Turnbull*, 2 Johns. 314; *S. C.*, 3 Am. Dec. 427; 2 Bl. Com. 261; Hargrave's Law Tracts, 28; Gould on Waters, § 158 and cases cited; *Mulry* v. *Norton*, 100 N. Y. 424, citing Hargrave's Law Tracts (Matthew Hale's De Jure Maris, 36–37); Cooke & Foster, M. 7 Jac. C. B.; *Morris* v. *Brooks*, decided by the Court of Common Pleas of Delaware; *Wallace* v. *Driver*, 31 L. R. A. (Ark.) 319; Hunt on Boundaries, &c. 29.

So that the washing away by freshets of the surface of the soil of Brunot's Island inside of the commissioners' line of 1865, which is admitted to be located upon what was the actual high-water mark at that time, has made no alteration in the boundary of the island. That boundary still remains where it was at that time, to wit, on the commissioners' line of 1865. *St. Louis* v. *Rutz*, 138 U. S. 226, 245. See also *Nebraska* v. *Iowa*, 145 U. S. 519; *Widdecombe* v. *Rosemiller*, 118 Fed. Rep. 295.

This proceeding is "not virtually a suit against the United States," but a suit to restrain the defendant, an executive officer of the Federal Government, from exceeding his authority to the impairment of the property rights of the claimant. *United States* v. *Lee*, 106 U. S. 218, 219; *Noble* v. *Union River Logging Railroad*, 147 U. S. 171; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 108; *Scott* v. *Donald*, 165 U. S. 112; *In re Tyler*, 149 U. S. 164; *Osborn* v. *Bank of the United States*, 9 Wheat. 842; *New Orleans* v. *Paine*, 147 U. S. 264; *Louisiana State Lottery Co.* v. *Fitzpatrick*, 15 Fed. Cas. 986.

A court of equity will entertain a bill to restrain the institution and prosecution of criminal proceedings, as threatened in this case, for the reason that such prosecution would interfere with, and, in effect destroy, the property rights of the complainant in the land in question. Because in fact the prosecution of such proceedings would

entirely deprive plaintiff of the use of its property and constitute such a taking of private property for public uses as a court of equity will always enjoin. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Central Trust Co.* v. *Citizens' Street Railway Co.*, 80 Fed. Rep. 225; *Louisiana State Lottery Co.* v. *Fitzpatrick*, 15 Fed. Cases, 986; *Dobbins* v. *Los Angeles*, 195 U. S. 241; *City of Hutchinson* v. *Beckham*, 118 Fed. Rep. 401; *Greenwich Ins. Co.* v. *Carroll*, 125 Fed. Rep. 126; *Frewin* v. *Lewis*, 4 Mylne & Craig, 249; *Baltimore* v. *Radeke*, 48 Maryland, 217; *Georgia R. R. Co.* v. *Atlanta*, 118 Georgia, 490; Lewis on Eminent Domain, par. 56; *Osborne* v. *Missouri Pac. Ry. Co.*, 147 U. S. 258, 259; *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 511–512.

Complainant does not contend that the mere establishing of the harbor lines complained of, and the requiring of the plat in the office of the Secretary of War, unaccompanied by the taking of any active measures on the part of the defendant to actually interfere with the complainant in the use of its property, would have furnished sufficient ground for the interference of a court of equity, as by injunction, as the mere establishing of harbor lines unaccompanied by any such action does not constitute such a cloud upon the complainant's title to his land or such invasion of his rights as would justify such relief. But the facts of this case at bar are exactly the reverse of the facts of *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646, 656, and *Prosser* v. *N. P. Ry. Co.*, 152 U. S. 59.

The fact that the land of the plaintiff of which the defendant is depriving the plaintiff the possession by threatening it with criminal prosecution if it uses said land—which in other words the defendant is attempting to take without compensation—is not located in the District of Columbia, does not deprive the Supreme Court of the District of jurisdiction. *Stone* v. *United States*, 167 U. S.

169; *Cole* v. *Cunningham*, 133 U. S. 107; *Phelps* v. *McDonald*, 99 U. S. 298.

Mr. Assistant Attorney General Knaebel for appellee:

The harbor line was lawfully established.

As riparian owner with or without the fee of the river bed, the appellant is in no position to complain of the new harbor line. No "taking" of property is involved in the incidental losses which result to such an owner from the exercise by Congress of its paramount power to improve and protect navigation. The navigable waters are the public property of the nation, and subject to all the requisite legislation by Congress. *Gilman* v. *Philadelphia*, 3 Wall. 725; *South Carolina* v. *Georgia*, 93 U. S. 4, 11; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 57 Fed. Rep. 803; *S. C.*, 179 U. S. 141; *Hawkins Point Light-House Case*, 39 Fed. Rep. 77; *United States* v. *Rio Grande Dam &c. Co.*, 174 U. S. 690, 708; *Union Bridge Company* v. *United States*, 204 U. S. 364, 400. A permission granted by the State years ago, but not acted on, cannot survive in the face of a sweeping policy of Congress.

The bill does not exhibit facts sufficient to show that the change in this instance was one of avulsion or submergence.

There is no allegation that the change occurred perceptibly. *Jefferis Case*, 134 U. S. 178. The rapidity with which floods and freshets wore away the bank, if they wore it at all, would depend upon a variety of physical conditions. They might wear rapidly, or gradually, or not at all; they might well add to instead of subtracting from the soil. The law is concerned only with the degree of speed with which the diminution takes place, but as to this the bill is wholly silent.

The difference between the processes is found in the fact that the operation of the one is sudden and its results

perceptible in their progress, while the other operates so gradually that the eye does not observe the inward movement of the water. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 47; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *Nebraska* v. *Iowa*, 143 U. S. 359, 361.

Admitting that the change was by a process akin to avulsion, and conceding freely the power of the State to do away with the common law of accretion and erosion entirely, and establish a permanent boundary for the plaintiff's land, that has nothing to do with the matter of protecting navigation. So far as the General Government is concerned, appellant is simply in the position of a riparian proprietor, owning the fee as far out as the Commissioners' line, subject to have his use of it regulated in the interest of commerce under the authority of Congress.

The court was without jurisdiction. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 639; *Dredging Co.* v. *Morton*, 28 App. D. C. 288. The suit cannot possibly be other than a suit against the United States. *Prosser* v. *Northern Pacific Railroad*, 152 U. S. 59; *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646; *S. C., sub nom. Board of Harbor Line Commissioners* v. *State*, 2 Washington, 530; 27 Pac. Rep. 550; *Harkrader* v. *Wadley*, 172 U. S. 148, 169; *Ex parte Young*, 209 U. S. 203, distinguished; and see *Fitts* v. *McGhee*, 172 U. S. 516.

The suit, therefore, is in effect a suit against the United States. *Minnesota* v. *Hitchcock*, 185 U. S. 386; *Board* v. *McComb*, 92 U. S. 531; *Oregon* v. *Hitchcock*, 202 U. S. 60. It is a palpable attempt to prejudge the merits of a criminal prosecution which the Attorney General would have a perfect right, and, indeed, would be under a duty, to institute if, in his best judgment, he should conclude that the harbor line was lawfully established.

The case is also clearly not such a suit as ought to be entertained by the court as a court of equity. It is objectionable from this standpoint in the first place as a

pure attempt to enjoin valid criminal proceedings. *In re Sawyer*, 124 U. S. 200, 209, 210; *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, *supra*.

Furthermore, only one punishment would be involved under the act of 1899 by the construction of the wharf beyond the harbor line. In that respect also the case differs greatly from the *Young Case*. There could be no multiplicity of prosecutions or cumulation of drastic penalties. Neither does it appear that great and irreparable loss will result from delaying the construction of the proposed wharf.

The harbor line produces no cloud upon the title and does not for any other reason afford a ground of equitable interference, as was fully determined by this court in *Prosser* v. *Northern Pacific Railroad Company*, *supra*.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought in the Supreme Court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, Pennsylvania, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing criminal proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. The Court of Appeals of the District affirmed a decree sustaining a demurrer to the bill, and the complainant appeals.

The allegations of the bill, in substance, are as follows:

The complainant, a corporation of the Commonwealth of Pennsylvania, is the owner in fee of "Brunot's Island," formerly Chartier's or Hamilton's Island, in the Ohio River, in Allegheny County, Pennsylvania. In 1858, a statute was enacted in Pennsylvania providing for the appointment of commissioners to ascertain and mark the

lines of ordinary high and low water in the Allegheny, Monongahela and Ohio rivers in the vicinity of Pittsburgh. The act recited that the lines of land along the shores of the rivers had not been clearly ascertained, and it was important to all persons interested that their several rights and privileges should be defined. After the Commissioners' surveys had been completed and the lines located, opportunity was to be afforded in the court, by which they were appointed, for any needed corrections; and the map or plan finally determined upon was to be recorded. The statute declared that "the lines so approved shall forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid." Proceedings were had accordingly and the high and low-water lines along the shore of Brunot's Island were definitely fixed. In consequence the bill asserts that all the land, whether or not under water, inside of the Commissioners' lines became the property of the owners of Brunot's Island; and that by virtue of the statute, and the action of the Commissioners under it in fixing the high-water line as a permanent boundary, the right of the owners of the island to accretions beyond that line was taken away, while at the same time they were no longer subject to loss or diminution of their land by reason of its submergence "through the avulsion of floods or freshets or through gradual erosion."

Subsequent to the establishment, in 1865, of the State Commissioners' line, a considerable portion of the shore of the island, "on the so-called back channel, within the said high water mark," was washed away from time to time by heavy floods and freshets, so that a large part of the upland was slightly submerged, but not to an extent sufficient to permit of navigation. Some years ago, the United States Government, in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below Brunot's Island, known as the Davis Island Dam. And

the effect of this dam, says the bill, by the increase of the depth of water in the channel, was to submerge Brunot's Island to a far greater extent and to make the water over the complainant's land navigable "at certain times, and for certain purposes," where it was not navigable before.

In 1895, the Secretary of War, claiming to act under the authority of § 12 of the act of Congress of September 19, 1890, and knowing that the shore of Brunot's Island had been washed away by floods and freshets, established a harbor line which ran across the complainant's land within the line of the State Commissioners. It is further alleged that although the submerged land was generally covered by water, "it was not ordinarily navigable water," and "has never constituted, nor does it now constitute a part of the public navigable waters of the United States;" that no authority was conferred by the act of Congress upon the Secretary of War to regulate or interfere with the use of the complainant's land by the establishment of harbor lines upon the same; and that even if the water over this land was in fact part of the public navigable waters of the United States, without being rendered thus navigable by the construction of the dam, still the Secretary of War had no right so to run the harbor line over the land in question as to deprive the complainant of its use and enjoyment. It was the right of the complainant, the bill avers, to repair the damage caused by floods and freshets and to reclaim the submerged portion by filling in or wharfing, "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

In 1907, the Secretary of War, claiming authority under § 11 of the act of Congress of March 3, 1899, against the complainant's protest, changed the harbor line. The report of the United State engineer at Pittsburgh stated that the conditions of high and low water had not changed since 1895, but as along a part of the shore of the island,

the harbor line of 1895 ran several hundred feet outside high-water mark as it then existed, it seemed advisable to change it so as to coincide with the actual high-water mark. A copy of the report with the order of the Secretary of War, dated February 23, 1907, was annexed to the bill and made a part of it. In this it is stated that the location of the proposed harbor lines was within the bed of the stream as it existed as a physical fact.

The bill further shows that to facilitate the delivery of coal for the operation of its power house on the island, the complainant desired to reclaim a part of it which had been submerged by establishing a coal wharf on the back channel, where both the harbor line of 1895 and that of 1907 "ran some distance landward of the said State commissioners' high water line." According to the proposed plans, the wharf or pier was to extend over the complainant's land and to cross both of the harbor lines to the State commissioners' line. While these plans were being perfected, the Secretary of War, through his representative, the United States engineer officer at Pittsburgh, declared to the complainant that it had no right to build upon its land across either of the harbor lines, and he refused to permit the complainant to reclaim its land or to build its wharf thereon outside the harbor line of 1907. He threatened that if it undertook to do so, he would prevent it and cause the complainant and its employés "to be prosecuted and fined by the authorities of the Federal Government" for violations of the acts of Congress of September 19, 1890 (26 Stat. 426, c. 907), and March 3, 1899 (30 Stat. 1151, c. 425). It was further charged that if the Secretary of War had authority to fix the original harbor line of 1895, that his power was exhausted by what was then done, and that the harbor line of 1907 was wholly unauthorized.

In consequence of the severe penalties prescribed by the acts of Congress for the construction of buildings,

piers or wharves outside any harbor line established by the Secretary of War and by reason of the defendant's threats of prosecution in case the complainant carried out its plan of reclamation and the construction of its wharf, the bill avers that the complainant is prevented from making use of its property; that the defendant's action constitutes a taking of its property for public use without just compensation; that it is subjected in its endeavor, so long as the harbor line remains unmodified, to a multiplicity of criminal prosecutions; and that the harbor line is a cloud upon its title.

The provisions of the acts of Congress, referred to in the bill, are set forth in the margin.[1]

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[1] Section 12 of the act of September 19, 1890; (Chap. 907, 26 Stat. 426, 455), provided:

"SEC. 12. That section twelve of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulk-heads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense."

Sections 11, 12 and 17 of the act of March 3, 1899, (Chap. 425, 30 Stat. 1121, 1151–1153), are as follows:

"SEC. 11. That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided*, That whenever the Secretary of War grants to any person or

In demurring to the bill the defendant asserted that it was bad in substance, and also specially assigned the following grounds,

"1. This proceeding is virtually a suit against the United States.

"2. This Court has no jurisdiction to restrain the enforcement of a penalty or prosecution for violation of law.

"3. This Court has no jurisdiction to restrain the defendant from instituting criminal proceedings against complainant.

"4. This Court has no jurisdicion to declare or define harbor lines or boundary lines of land outside the District of Columbia and in the State of Pennsylvania.

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persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tide water displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tide-water channels between high and low water mark, to such an extent as to create a basin for as much tide water as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

"SEC. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

"SEC. 17. That the Department of Justice shall conduct the legal

"5. There is no jurisdiction in this Court to pass any decree removing cloud upon an alleged title of complainant in realty in the State of Pennsylvania, nor to accomplish the same by declaring the harbor lines referred to in the bill null and void."

First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully

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proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under the provisions of this Act, the persons so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States."

invaded. *Little* v. *Barreme*, 2 Cranch, 170; *United States* v. *Lee*, 106 U. S. 196, 220, 221; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Tindal* v. *Wesley*, 167 U. S. 204; *Scranton* v. *Wheeler*, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 843, 868; *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Scott* v. *Donald*, 165 U. S. 107, 112; *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643–645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

Second. The second and third grounds of demurrer, specially stated, raise the question as to the jurisdiction of the court to restrain the defendant from instituting criminal proceedings.

A court of equity, said this court in *In re Sawyer*, 124 U. S. 200, 210, "has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors. . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade

the domain of the courts of common law, or of the executive and administrative department of the government." *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, 172 U. S. 516, 531; 2 Story's Eq. Jur., § 893. But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 161, 162; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

It is urged that the statute authorizing the Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte Young*, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus un-

lawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property.

By § 12 of the act of March 3, 1899 (30 Stat. 1151, c. 425), it was provided that every person and every corporation which should violate any provision of § 11, relating to the observance of harbor lines, or any rule or regulation made by the Secretary of War in pursuance of that section, should be guilty of a misdemeanor and punished by fine or imprisonment. By § 17 it was made the duty of district attorneys of the United States to prosecute all offenders whenever requested by the Secretary of War. If the complainant's rights, as against the defendant, were as claimed, it was entitled to adequate protection. And, in such case, the remedy might properly embrace the restraining of unfounded prosecutions.

Third. The fourth and fifth special grounds of demurrer assert that the Supreme Court of the District of Columbia had no jurisdiction to define boundaries in the State of Pennsylvania, or to remove a cloud upon title to land in that State.

In dealing with these objections, it is important to observe the precise nature of the suit. It was not to determine a controversy as between conflicting claimants under the local law. It was not to restrain trespass. *Northern Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105. It was not brought to try the naked question of the title to the land. *Massie* v. *Watts*, 6 Cranch, 148, 158. While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still if its title to the land under water were established or admitted to be as alleged, the question would remain whether the defendant in imposing restrictions upon the use of the property was acting by virtue of authority validly conferred by a general act of

Congress. This was the principal question which the complainant sought to have determined. The defendant is within the District, amenable to the process of the court. There is no ground upon which it may be denied jurisdiction to decide whether he should be restrained from continuing his opposition to the complainant's plan of improvement. Rather should it be said that the case falls within the general rule sustaining the jurisdiction of a court of equity which has control of the person of the defendant and may compel obedience to its decree. *Phelps* v. *McDonald*, 99 U. S. 298, 308.

Fourth. Assuming that the court had jurisdiction, we are brought to a consideration of the equity of the bill.

It has been held that the establishment of a general system of harbor lines, for the protection of commerce and navigation, is not of itself an injury to property and cannot be restrained. *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646, 656; *Prosser* v. *Northern Pacific R. R. Co.*, 152 U. S. 59, 64, 65. But it has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights and thus to prevent him from enjoying what is asserted to be the lawful use of his property. *Prosser* v. *Northern Pacific R. R. Co.*, *supra*.

The complainant starts with the lines as laid down, in 1865, by the State Commissioners. These lines are averred to be "exactly in accordance with the then existing actual ordinary high and low water marks." The argument is (1) that, independently of the effect of the statute of Pennsylvania, the washing away of the banks, and the submergence of a portion of the island, during the subsequent years worked no loss of title, but that it remained absolute, including the right of reclamation and improvement of the submerged land inside the former line of high water; and (2) that, by virtue of the statute, the

boundary was permanently fixed by the State Commissioners' high-water line and no subsequent encroachment of the water could affect the rights of the owner.

(1) It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected and the boundary remains at the former line. *Rex* v. *Yarborough*, 3 B. & C. 91; *S. C.*, 2 Bligh, N. S. 147; *Gifford* v. *Yarborough*, 5 Bing. 163; *New Orleans* v. *United States*, 10 Pet. 662, 717; *Banks* v. *Ogden*, 2 Wall. 57; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 67, 68; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 190–193; *St. Louis* v. *Rutz*, 138 U. S. 226, 245; *Nebraska* v. *Iowa*, 143 U. S. 359; *Shively* v. *Bowlby*, 152 U. S. 1, 35; Hale, *De Jure Maris*, Ch. 1, 4, 6, Hargrave's Law Tracts; *Mulry* v. *Norton*, 100 N. Y. 424. The doctrine that the owner takes the risk of the increase or diminution of his land by the action of the water applies as well to rivers that are strong and swift, to those that overflow their banks, and whether or not dykes and other defenses are necessary to keep the water within its proper limits. It is when the change in the stream is sudden, or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *County of St. Clair* v. *Lovingston*, *supra* (p. 68).

We are confined to the allegations of the bill. We have

not the advantage of proof and findings, or even of a particularized description in the bill itself, as to the precise character of the alterations in the banks of Brunot's Island which took place during the long period to which the bill refers. It is alleged "that subsequent to the establishment in 1865 by said Commissioners of the line of high water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's Island on the so-called back channel, within the said high water mark was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is the land above high water mark, became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind thereover." There is no other statement on the point save that the bill asserts that the complainant was entitled to reclaim "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

It is manifest that these allegations are inadequate to support the complainant's contention. The determining words are that the land was "washed away from time to time by heavy floods and freshets," and the reference is to what occurred in many years. This is far from a statement that at any particular time there was such a sudden, violent, and visible change as to justify a departure from the ordinary rule which governs accretion and diminution albeit the stream suffer wide fluctuations in volume, the current be swift, and the banks afford slight resistance to encroachment.

For example, the general principle of accretion, which has that of diminution as its correlative, applies to such rivers as the Mississippi and the Missouri, notwithstanding the extent and rapidity of the changes constantly effected. *Jefferis* v. *East Omaha Land Co., supra; Jones* v. *Soulard*, 24 How. 41; *Saulet* v. *Shepherd*, 4 Wall. 502;

County of St. Clair v. *Lovingston, supra; St. Louis* v. *Rutz, supra.* In *Nebraska* v. *Iowa, supra,* the question concerned the boundary between the two States, which, by the acts of admission, was the middle of the main channel of the Missouri River. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel so that in the latter year it occupied a very different bed from that through which it flowed in the former year. The opinion of the court describes in detail the physical conditions along the river. The court said (pp. 368–370): "The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. . . . The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto. Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream." And, in the same case, the decision clearly points the distinction between the losses and gains thus described, and an abrupt, visible change where at one place, at a particular time, the river having "pursued a course in the nature of an ox-bow, suddenly

cut through the neck of the bow and made for itself a new channel" (p. 370).

The present case falls within the category first mentioned, and according to general principles of law the owner would bear the losses caused by the washings of the river.

The bill also alleges that "some years ago the United States Government, in the interest of navigation and in order to increase the depth of water in the harbor of Pittsburgh, caused a dam to be constructed across the Ohio River a short distance below said Brunot's Island known as the Davis Island Dam. The effect of this dam was to very decidedly increase the depth of the water in the channel back of Brunot's Island, and to cause the water of the river to flow higher upon the land of your orator, and to submerge same to a far greater extent and in fact to make said water which submerged your orator's land navigable at certain times, and for certain purposes, which was not navigable before the construction of said dam."

It will be observed that it is said that the United States caused the erection of the dam in the interest of navigation. The complainant purchased the island subsequently, in the year 1896. And we are not concerned here with the question whether there was any appropriation of land of the former owner by the United States and a cause of action arose to recover its value. *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Lynah*, 188 U. S. 445; *Bedford* v. *United States*, 192 U. S. 217; *Manigault* v. *Springs*, 199 U. S. 473; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 583, 584. So far as the bill shows the dam was lawfully built, and the allegations with respect to it wholly fail to state any case entitling the complainant to relief by reason of its construction.

(2) The complainant, however, insists that the effect of the Pennsylvania statute was to fix the boundary of the island permanently at the State Commissioners' high-

water line, and hence that within that line it was entitled to make the desired reclamation and improvement.

This statute (act of sixteenth April, 1858), provided that the Commissioners' lines approved by the court should "forever after be deemed, adjudged and taken firm and stable for the purposes aforesaid." The Supreme Court of Pennsylvania has held that the purpose of the act was to regulate the rights of the public in respect to navigation and to prevent private rights from being exercised to the prejudice of the public interest. *Wainwright* v. *McCullough*, 63 Pa. St. 66; *Zug* v. *Commonwealth*, 70 Pa. St. 138, 142; *Poor* v. *McClure*, 77 Pa. St. 214, 219; *Allegheny City* v. *Moorehead*, 80 Pa. St. 118, 139, 140. In *Wainwright* v. *McCullough* (1869), *supra*, that court, holding that the statute was not applicable to disputed boundaries between private owners, considered the navigable character of the rivers to which it related, the extent of riparian rights under the law of the State, and the meaning of the act in the light of the mischief which it was intended to correct. The court said (p. 73):

"In order to arrive at the legal effect of the lines established by the commissioners under that act, we must ascertain its true purpose; and to reach this, it becomes necessary to examine the navigable character of the rivers Allegheny, Monongahela and Ohio, and the rights of the riparian proprietors upon their banks. These rivers are among the largest in the state; larger than the Schuylkill and Lehigh, recognized as navigable in the early history of the province, and have been repeatedly held by name to be rivers naturally navigable, and therefore classed with the Delaware and Susquehanna: *Carson* v. *Blazer*, 2 Binney, 478; *Shrunk* v. *Schuylkill Nav. Co.*, 14 S. & R. 79, 80; *Hunter* v. *Howard*, 10 S. & R. 244. Many acts have been passed declaring tributaries of these rivers navigable. But an act perhaps most pertinent to this controversy is that of 8th April, 1785, 2 Sm. Laws, 317,

regulating the taking up of lands within the new purchase, of which the 13th section expressly excepts *islands* in the Ohio, *Allegheny* and Delaware.

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"This being the navigable character of the stream, the rights of the riparian owners are settled by numerous decisions, a few of which may be referred to: *Carson* v. *Blazer, supra; Shrunk* v. *Schuylkill Nav. Co., supra; Ball* v. *Slack*, 2 Whart. 508; *Zimmerman* v. *Union Canal Co.*, 1 W. & S. 346; *Bailey* v. *Miltenberger*, 7 Casey, 37; *McKeen* v. *Delaware Div. Canal Co.*, 13 Wright, 424; *Tinicum Fishing Co.* v. *Carter*, 11 P. F. Smith, 21, opinion by Sharswood, J., decided last winter at Philadelphia. From these and other cases, it will appear that the absolute title of the riparian proprietor extends to high-water mark only, and that between ordinary high and ordinary low water-mark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway. He cannot occupy to the prejudice of navigation or cause obstructions to be placed upon the shore between these lines, without express authority of the state.

"The case of *Bailey* v. *Miltenberger*, 7 Casey, 37, decided in 1856, doubtless had something to do in turning public attention to the shores of the streams surrounding the city of Pittsburg, which led to the passage of the Act of 1858, for the purpose of defining the low and high water-lines. It referred to the mistaken idea entertained by some proprietors of making ground for their mills, by depositing cinders on the shore between low and high water marks. 'The Allegheny and many other navigable rivers' (says the opinion) 'do not, at the time of low water, occupy over one-third of their bed; and it would be most disastrous to allow every owner to fill out his land to low water-mark.' This state of affairs, for these rivers had been seriously encroached upon at and opposite Pittsburg,

no doubt led to the Act of 16th April, 1858, Pamph. L. 326. It begins by a recital, 'Whereas, The lines of lands on and along the shores at the rivers at and near the city of Pittsburg, in the county of Allegheny, have never yet been clearly ascertained, and as it is important to the owners of such lands, the persons navigating the waters of, and the corporations adjacent to, such rivers, and to all parties interested, to know and to have their several rights and privileges in extension and limitation ascertained and defined; therefore,' &c. The first impression arising from this language might seem to be that the law was intended to ascertain and fix these high and low water lines to end all controversies, *private* as well as public. But a careful consideration of its purpose and provisions shows that it is not applicable to disputed boundaries between private owners, but was intended to regulate the respective rights of the public and the landowners, over whose property the right of navigation extends between high and low water lines.

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"The effect of the lines as established is thus stated: 'the lines so approved shall for ever after be deemed, adjudged and taken, firm and stable for the purposes aforesaid.' If we seek for the 'aforesaid' purposes, the act discloses none but those relating to the public interest and that of the riparian owner. Then if we advert to the power of the state over navigable streams, as stated in the authorities cited, we discover that it is plenary over the subject of navigation and the improvement of these natural channels of commerce, while the ownership of the riparian proprietor is qualified between the lines of low and high water. The legislature may, therefore, with great propriety define the bounds of high and low water, by means of a suitable commission for the purpose of regulating the public right, so as not to conflict with private interests, and to prevent private rights from being exercised

to the prejudice of public interests; for example, to prevent the shores from being filled up with great banks of cinders."

In *Allegheny City* v. *Moorehead* (1875), *supra*, the question was presented whether by the fixing of water lines under the act of 1858, title had been vested in the city of Allegheny or lot owners, so as to defeat the claim of the plaintiff Moorehead under a subsequent patent from the State. The court said (p. 139): "Nor can the operation of the Act of 1858 be extended by the act of the commissioners in running out the low-water line of the northern shore of the river to include a part of what was Killbuck island. It was not the purpose of the commissioners to transfer titles, but to mark the boundaries of *riparian* rights, so as to make them certain and permanent in their extent. So it was not the intention of the framers of the Act of 1858 to pass titles to lands, or to ascertain boundaries between individuals; but it was their purpose to regulate the right of navigation along the shores of these rivers by establishing high- and low-water lines, which would definitely ascertain and fix the extent to which the right could be exercised; and the extent to which the owners of the land could exercise their own rights under the law of the state."

It is contended for the complainant that the effect of the statute was to secure to riparian owners complete protection against any loss of their land, or of the right to build upon it, by reason of the gradual washing away of the banks of the river; that the State chose to resign to the riparian proprietors its right to such additions from the moving landward of the low-water mark, and required the owner at the same time to surrender in the interest of navigation his right to alluvion. In support, the complainant cites the opinion of the Court of Common Pleas No. 2 of Allegheny County in *Briggs* v. *Pheil* (1894), 42 Pittsburgh Legal Journal, p. 18, in which it is said with respect to the same statute: "At the passage of this act

the riparian owner owned absolutely to high water mark, and had a qualified property to low water mark, and outside of the low water mark the title to the soil was in the State. It seems to us there can be no doubt that the State had power to enact that thereafter the legal limits of the property should remain unchanged, either by gradual accretions or by gradual cutting away. This in our opinion was intended to be done and was done by the Act of Assembly and the proceedings thereunder. . . . It seems to us that the establishing of these lines, at least, as between the State and riparian owners, fixed the lines for the future. If the river washes in beyond the high water line the owner may fill up and reclaim the lost land, and on the other hand accretions belong to the State or the municipalities."

The established doctrine is invoked that the title to the soil under navigable waters within their territorial limits, and the extent of riparian rights, are governed by the laws of the several States, subject to the authority of Congress under the Constitution of the United States. *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 669; *St. Louis* v. *Rutz*, 138 U. S. 226, 242; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 402; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 435, 452; *Shively* v. *Bowlby*, 152 U. S. 1, 40–47; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 365. Let it be assumed that the Pennsylvania statute in its regulation of rights, established the Commissioners' high-water line as the permanent boundary of the island and conferred upon the riparian owner, so far as it was within the competency of the State to confer it, the right to fill in and to erect structures to the limit of this line, regardless of subsequent changes in the actual high-water line caused by the washing away of the banks of the river. What, then, was the power of Congress with

respect to the river and what was the extent of the authority conferred upon the Secretary of War?

When the Secretary of War, in 1895, fixed harbor lines he dealt with the stream as it then existed. Whatever right the owner of the island may have had under the state law to reclaim the submerged land within the former line of high water, had not been exercised. The bill, in alleging that the new harbor line ran across the complainant's land, must be taken to refer to the submerged land already described. This is the import of its allegations and is shown by the record of the War Department annexed to the bill. In establishing this line, the Secretary of War followed quite closely the actual line of high water as it existed in 1895, except in the back channel of Brunot's Island where it ran several hundred feet outside the then high-water mark. The change of the harbor line at this point, in 1907, was for the purpose of making the line coincide with the actual high-water mark and in the report of the United States engineer who advised the change it was said that the lines as previously established had "not been filled out to, and the river bed on the Brunot Island side, and in the bend referred to" was in "essentially the same condition" as at the time the harbor lines of 1895 were fixed. He added:

"Pittsburgh suffers annually from floods and in my opinion any material contraction of the channel immediately below the city would result in general injury and would produce conditions detrimental to navigation and to harborage, and it is respectfully recommended that the changes in the established harbor lines shown and described on the map inclosed herewith be made, such changes being necessary in preserving and protecting the harbor of Pittsburgh.

"The location of the proposed harbor lines recommended in this communication is within the bed of the stream as it exists as a physical fact."

To this stream, as a highway of commerce, the power of Congress extended; a power which "acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. The exercise of this power could not be fettered by any grant made by the State of the soil which formed the bed of the river, or by any authority conferred by the State for the creation of obstructions to its navigation. "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." *Gilman* v. *Philadelphia*, 3 Wall. 713, 725.

Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the State in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream (Rolle's Abr. 390; *Carlisle* v. *Graham*, L. R. 4 Ex.

361, 367, 368) and the authority of Congress goes with it. When the State of Pennsylvania established harbor lines and thus undertook to regulate the rights of navigation, its action, however effective as between the State and the riparian proprietors, was necessarily subject to the paramount power of Congress. The state lines can be conceded no permanent force, as against the will of Congress, without substituting for its constitutional authority the supremacy of the State with respect to navigable waters.

It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421. And in its regulation of commerce it may establish harbor lines or limits beyond which deposits shall not be made or structures built in the navigable waters. The principles applicable to this case have been repeatedly stated in recent decisions of this court. *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge* v. *United States*, 216 U. S. 177; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.

In *Gibson* v. *United States, supra*, the construction of a dyke in the Ohio River under the authority of the Secretary of War had substantially destroyed the landing on and in front of a farm owned by Mrs. Gibson "by preventing the free egress and ingress to and from said landing" to "the main or navigable channel" of the river. The court said (pp. 271, 272, 275): "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.

South Carolina v. *Georgia*, 93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S. 1; *Eldridge* v. *Trezevant*, 160 U. S. 452. . . . The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

Again, in *Scranton* v. *Wheeler*, *supra*, the question arose with respect to the riparian owner whose access from his land to navigability was permanently lost by reason of the construction by the United States of a pier resting on submerged lands in front of his upland. The court said in its opinion (p. 163): "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

In *Union Bridge Co.* v. *United States*, *supra*, the Secretary of War found a bridge to be an unreasonable obstruction to the free navigation of the Allegheny River and required the Bridge Company to make certain changes which it was insisted it could not be compelled to make without compensation. The court, after reviewing the

authorities, said (pp. 400, 401): "Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the Bridge Company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We cannot give our

assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made."

It must be concluded, therefore, that it was competent for Congress to provide for the establishment of the harbor lines in question for the protection of the harbor of Pittsburgh. It acted within its constitutional power in authorizing the Secretary of War to fix the lines. *Union Bridge Co.* v. *United States, supra* (pp. 385–388); *Monongahela Bridge* v. *United States, supra* (p. 192). That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred.

The bill failed to show any ground upon which the complainant was entitled to relief and it was properly dismissed.

Decree affirmed.